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in the
Supreme Court
of the
United States

OCTOBER TERM, 1972

NO. _____

JOHN CLARENCE COOK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, JOHN CLARENCE COOK, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, dated June 1, 1972; the Order Denying Petition for Re-Hearing, dated June 29, 1972; and the denial of Petitioner's Motion for Remand for Evidentiary Hearing dated July 18, 1972.

OPINIONS BELOW

The judgment of the United States District Court for the Southern District of Florida was rendered on June 9, 1971, and on said date the Petitioner was sentenced to a term aggregating 12 years and fines aggregating $30,000.00.

The decision and opinion of the United States Court of Appeals for the Fifth Circuit was entered on June 1, 1972; such opinion has not as yet been reported, but a copy of said opinion is attached hereto as Appendix B. Petition for Re-Hearing (Appendix C) was denied on June 27, 1972. Motion for Remand for Evidentiary Hearing (Appendix D) was denied on June 18, 1972 (Appendix E).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

Jurisdiction is also invoked under Rule 19(1)(b) of the Rules of the Supreme Court of the United States adopted June 12, 1967, effective October 2, 1967, because a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter, or has decided a federal question in a way in conflict with applicable decisions of this Court, and has decided an important question of federal law which has not been, but should be, settled by this Court.

QUESTIONS PRESENTED

(1) WHETHER PETITIONER WAS DENIED HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE, CONTRARY TO A COURT-APPROVED STIPULATION ENTERED INTO BY ALL PARTIES PRIOR TO THE COMMENCEMENT OF TRIAL PROCEEDINGS, THE TRIAL COURT, *SUA SPONTE*, THEREAFTER DIRECTED THE ADMISSION OF TESTIMONY (CONCEDEDLY PREJUDICIAL) WHICH INCULPATED PETITIONER'S OWN COUNSEL AS A PARTICIPANT IN ONE OF THE OVERT ACTS CHARGED IN THE INDICTMENT.

(2) WHETHER PETITIONER WAS DENIED A FAIR AND IMPARTIAL TRIAL IN CONTRAVENTION OF HIS FIFTH AMENDMENT CONSTITUTIONAL RIGHT OF DUE PROCESS, WHERE THE TRIAL COURT *SUA SPONTE* ABROGATED A PRE-TRIAL COURT-APPROVED STIPULATION RESTRICTING THE INTRODUCTION OF EVIDENCE KNOWN AND ACKNOWLEDGED TO BE MATERIALLY PREJUDICIAL TO PETITIONER.

(3) WHERE THE RECORD DEMONSTRATES THE COMPLETE ABSENCE OF ANY KNOWING AND/OR INTELLIGENT WAIVER OF PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND THE FURTHER LACK OF ANY JUDICIAL INQUIRY WITH RESPECT THERETO, CAN WAIVER OF SUCH FUNDAMENTAL RIGHT BE IMPLIED SOLELY THROUGH THE PROPER EXERCISE OF PETITIONER'S CONCOMITANT SIXTH AMENDMENT RIGHT TO SUMMON A NECESSARY AND MATERIAL WITNESS IN HIS BEHALF.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

(1) Title 28, U.S.C. Section 1254(1)

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

(2) Rule 19(1)(b) Rules of Supreme Court of the United States

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state

> or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

(3) The Fifth Amendment, United States Constitution.

(4) The Sixth Amendment, United States Constitution.

STATEMENT OF THE CASE

Petitioner JOHN CLARENCE COOK was indicted in four counts of a nine-count indictment which jointly charged him and seven co-defendants with conspiring to burglarize post offices and to receive, possess and sell property (postage and savings stamps) stolen from the United States, and separately charged Petitioner in three substantive counts of possessing and concealing such property, in purported violation of Title 18, U.S. Code Sections 371, 641 and 2115.

Of the original eight individuals charged in the indictment (App. A), only the Petitioner and co-defendants Rick Chapman and Roy Renderer proceeded to trial. Prior thereto, three of the defendants charged, i.e., Jimmy Jack Holmes, William Allison and Otto Powers, entered pleas of guilt as to the conspiracy count; one of the defendants,

i.e., Herman Gordon, had died, and the remaining defendant, Marianne Cook, was granted a severance and dismissal.

At the conclusion of the Government's case, the trial court directed verdicts of acquittal on the conspiracy charge as to the co-defendants Chapman and Renderer. Thereupon, Petitioner and each of such co-defendants moved for separate trials as to the remaining and *unrelated* substantive counts charged in the indictment, which motions were denied by the trial court.

The trial jury returned verdicts of guilt as against the Petitioner on both the conspiracy count and the three substantive counts charged against him in the indictment. The Court thereafter entered an adjudication of guilt as to each of such counts, and sentenced Petitioner thereon to an aggregate of 12 years imprisonment and an aggregate fine of $30,000.00.

The Petitioner thereupon entered an appeal to the United States Court of Appeals for the Fifth Circuit, which affirmed the decision of the trial court (Appendix B). Thereafter, petitioner filed his Petition for Re-Hearing (Appendix C) and Motion for Remand for Evidentiary Hearing (Appendix D), which were denied by such Circuit Court.

The facts giving rise to the issues circumscribed by the within Petition are as follows:

The undisputed evidence adduced at trial reflected that all of the burglaries of the various United States Post Offices referred to in the indictment were committed by the

co-defendants Holmes and Allison and others not named as defendants in the cause. Following one of such burglaries, i.e., the burglary of the Azalea Park branch post office located in Orlando, Florida, the co-defendants Holmes and Allison transported the proceeds thereof to Petitioner's residence in Miami, Florida, in the company of a fellow-burglar, Willie Urquhart.

Upon arrival, the co-defendants Holmes and Allison took such proceeds, contained in a footlocker, into Petitioner's residence, while Urquhart remained outside in a car. Shortly thereafter, a police car arrived and arrested Urquhart, while the co-defendants Holmes and Allison remained in Petitioner's residence purportedly observing such arrest through a window.

After such arrest and departure of police, Petitioner's trial counsel, Louis Vernell, in response to Petitioner's telephone call, arrived at Petitioner's home accompanied by an unidentified girl and a male client, i.e., Ralph Harrington. While the girl and Harrington remained in the car, Petitioner's said counsel entered Petitioner's residence and shortly thereafter left with the co-defendants Holmes and Allison.

After driving a short distance, Vernell's vehicle was stopped by the police and he, the girl, Harrington, Holmes and Allison were subjected to interrogation and demands for identification. Only Vernell and Harrington produced such identification, and purportedly, upon the advice of Vernell, the co-defendants Holmes and Allison refused to do so. After possibly one hour, all of such individuals were allowed to leave without charges being made and/or proffered against any of them. Thereupon, Vernell drove the

girl and Harrington to a restaurant and then took the co-defendants Holmes and Allison to a motel for the night. For his services and efforts in their respective behalf, Holmes and Allison paid Vernell the sum of $500.00.

Thereafter, Vernell represented Willie Urquhart on the charge for which he was arrested, i.e., disorderly conduct, and gained an acquittal on such charge.[1]

Shortly prior to Petitioner's trial, it was disclosed that the co-defendants Holmes and Allison, who had previously pled guilty to the conspiracy count of the indictment, would testify in the cause as Government witnesses against Petitioner. All parties then became immediately aware of the extreme prejudice which would be occasioned through the possible disclosure by such witnesses at trial of Vernell's purported participation in the aforementioned overt acts, especially since Vernell was appearing in the cause as trial counsel for Petitioner.

Ergo, at the outset, such matters and purported participation of Vernell were brought to the attention of the trial judge. Thereupon, and for the *sole* purpose(s) of avoiding a continuance of the trial to engage other counsel for Petitioner, and to otherwise obviate any possibility for a mistrial, the parties, in open court, entered into a stipulation with the approval of the trial judge. As stipulated, none of the Government witnesses would mention Vernell

[1]All of the matters herein related concerning the activities of Vernell were received in evidence. It was also charged by Government counsel during trial proceedings that Vernell was alleged to have been aware of the presence of contraband while he was in the Cook residence, and that he had knowledge of the full circumstances thereof. Because of the stipulation entered into between the parties, *infra*, Vernell was unable to testify or otherwise refute such charges and accusations.

during trial proceedings. In consideration for such limited stipulation, Vernell agreed to waive any right to testify in the cause. The entire scope of such stipulation is reflected in Appendix F, which constitutes an excerpt of proceedings conducted prior to the actual commencement of the trial.[2]

All parties thereafter complied with the Court-approved stipulation in both their direct and cross-examination of the witnesses testifying in the cause. However, during presentation of Petitioner's case in chief, the Petitioner called Ralph Harrington as a witness, who thereupon testified as to matters occurring in his presence and to conversations overheard by him between the co-defendants Holmes and Allison while in Vernell's vehicle; such testimony served to impeach Holmes' testimony.

Similar to the cautionary instructions provided to the Government witnesses Holmes and Allison (per stipulation), Harrington refrained from any mention of Vernell, and, in lieu thereof, referred to such individual as "the party who I was with." During direct examination, the *trial judge* questioned such witness as to the name of the individual referred to. Immediately, objections were made and a sidebar conference held, whereupon the trial judge excused the jury for further argument.

During such argument, the trial judge weighed the impact of Vernell's alleged involvement (and prejudice to Petitioner) and, indeed, suggested Vernell's own criminal liability. Addressing Petitioner's counsel, the Court stated (Appendix G):

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[2]Such stipulation made absolutely no reference to either the unnamed girl or Harrington, *nor were any restrictions imposed upon either the Government or the defense to call such individuals as witnesses in the cause.*

"THE COURT: And whether you knew it or not, you certainly were aware that they were men that Cook did not call the police to remove, if they were intruders in his home or unwelcome guests, but got his attorney in there to remove them under circumstances which I am frank to say, Mr. Vernell, are strongly indicative of the fact that as his counsel, whether wittingly or unwittingly, you were participating in spiriting away from possible discovery by the police two men who were certainly, from the evidence before me, criminals and recidivists of a very marked degree, and the aroma is not good.

MR. VERNELL: Your Honor, if I may, to correct the aroma and inference, I never saw those men before that night. I never saw them, and I did not even know their names.

THE COURT: Now, look, there is no use going into this, because we cannot go into the confidential conversations had between you and Cook, as counsel and client.

MR. VERNELL: Yes, sir.

THE COURT: But we are not stupid. We know Mr. Cook, if these were uninvited or unwelcome guests, would have called the police and said, 'I've got two bums' or two something, 'in my house. They won't get out. Come get 'em.' But he called you, his attorney.

> Now, you do not call an attorney in these circumstances to get somebody away from your house, unless it is something that you would much prefer the police would not know about; and whether unwittingly or not, it appears to me that you lent yourself to aiding the enterprise of getting these men away from the Cook house before they were either detected in the Cook house by the police, or detected by the police when emerging from the Cook house."

Over the repeated objections of all defense counsel, the trial judge directed that Harrington disclose the name and presence of Vernell to the jury. Each of the defense counsel thereupon moved for a mistrial, which was denied by the trial court.[3]

Upon the resumption of trial proceedings, Harrington, under the direction of the Court, fully revealed the identity and participation of Vernell in connection with the subject overt acts. Thereafter, the trial court, again over the objection of all defense counsel, permitted the recall of the co-defendant Holmes, who wrongfully testified that his previous failure to mention the name of Vernell was *not* because of any stipulation between the parties, but to avoid "undue embarrassment to Vernell." (App. H).

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[3]Significantly, prior to such occurrence and during the direct examination of the Government witness Holmes, a similar situation occurred in which the trial judge asked such witness the name of the individual who had driven him away from Petitioner's residence on the night in question. Upon being reminded of the stipulation, the trial judge immediately withdrew such question and any further inquiry along such lines.

To compound the prejudice to Petitioner, the trial judge on two occasions, i.e., during Harrington's examination and again in its closing instructions, erroneously charged the jury that the failure of the Government witnesses Holmes and Allison to make reference to Vernell was to save such counsel from embarrassment (App. G). Though requested by Petitioner's counsel, the trial court refused to publish the actual stipulation of the parties.

Following Petitioner's conviction, and in the course of appellate review by the United States Court of Appeals, the Petitioner filed a motion to remand the cause for evidentiary hearing for the purpose of determining: (a) Whether the Petitioner at any time knowingly or intelligently waived his constitutional right to the effective assistance of counsel, and (b) whether Petitioner or his counsel violated the court-approved stipulation in calling Harrington as a witness in the cause. (App. D).

In support of such motion, Petitioner attached thereto the affidavits of all (four) defense counsel present at, and who participated in, the court-approved stipulation, i.e., Harvey StJean, Donald Bierman, George Gold and Louis Vernell. Upon oath, each of such counsel stated: (a) That the subject stipulation did not preclude Petitioner's calling of Harrington as a witness in the cause; (b) That Petitioner had not in anywise violated such stipulation; and, (c) That the disclosure of Vernell's identity and presence had an extremely prejudicial effect upon the jury's deliberation and the outcome of the cause.

Further appended to such motion for remand was the affidavit of Petitioner, which reflected: (a) That he would not have continued with Vernell as trial counsel

without entry into the subject stipulation and full adherence thereto by all parties; (b) That he at no time waived his right to the effective assistance of counsel and that no judicial inquiry as to the same was ever made by the trial court; and, (c) That by reason of the trial court's abrogation of the subject stipulation, the Petitioner felt prejudiced, rather than benefited, from the presence of Vernell as his trial counsel.

Upon denial of such Motion for Remand and the entry by the Circuit Court of its opinion affirming the judgment of the trial court, the Petitioner herein respectfully submits the within Petition for Writ of Certiorari, and the cause is thus presented before this Honorable Court.

FEDERAL JURISDICTION

Federal jurisdiction in the first instance is based upon alleged violations of Title 18, U.S. Code, Sections 371, 641 and 2115.

ARGUMENT

REASONS FOR GRANTING THE WRIT

The decisions and opinion as rendered by the Circuit Court of Appeals, Fifth Circuit, in the case at bar, should be reviewed by this Honorable Court for the following reasons:

I — The Necessity and Propriety of the Pre-Trial Stipulation of the Parties.

Prior to the commencement of trial proceedings, both the within Petitioner and his trial counsel were confronted with a dilemma. Through discovery process and advice imparted by the Government prosecutor, it was ascertained that two of the co-defendants charged in the same indictment with Petitioner had not only pled guilty to the conspiracy count, but intended to testify as witnesses for the Government in the prosecution of the Petitioner. It was further revealed that the testimony of such individuals would encompass activities and knowledge on the part of Petitioner's trial counsel of an inculpatory nature, and would otherwise serve to directly link such counsel to certain of the overt acts charged against Petitioner (Statement of the Case, *supra.*)

It was accordingly obvious that the receipt of such testimony would not only emasculate the effectiveness of Petitioner's trial counsel, but would otherwise materially prejudice him at trial.

Ergo, to avoid a continuance of trial in order to engage other counsel for Petitioner, and to otherwise obviate the possibility of a mistrial, it was agreed that such Government witnesses would refrain from mentioning either the name or participation of Petitioner's counsel in connection with any overt act charged.

Such agreement was formulated into a stipulation entered into at the commencement of trial proceedings, and the same received the full accord of the trial judge (Appendix F). In *sole* consideration for such stipulation, Petitioner's trial counsel agreed not to take the stand.

Clearly, the purpose and intention of such stipulation, as well as the terms and conditions thereof, were the proper subject of agreement between the parties and enforceable by the trial court.

Stipulations between parties as to evidence and matters concerning the conduct of trial proceedings are not only favored by the courts, but are deemed to be "controlling and conclusive and courts are bound to enforce such stipulations." *Burstein v. U.S.*, 232 F.2d 19, 22 (8th Cir. 1956).

Significantly, in *Bradley Co. v. Local Union No. 3*, 51 F.Supp. 36 at 40 (S.D.N.Y. 1943), the Court held that it was "wholly without power to nullify or deprive either party of the effect of the stipulation or of the order."

In *Morse Boulger Destructor Co. v. Camden Fibre Mills, Inc.*, 239 F.2d 282 (3rd Cir. 1956), the court held that even if a stipulation had been inadvertently, inadvisedly or improvidently entered into, the only relief which the Court could grant, except to honor the stipulation, would be to have placed the parties into a position of status quo before the stipulation.

In the case at bar, the presence of Vernell as trial counsel would have made it impossible to restore the parties to a position of status quo without the declaration of a mistrial and a consequent new trial, wherein other counsel would necessarily be employed to represent the interest of the within Petitioner.

In *Laird v. Air Carrier Engine Service, Inc.*, 263 F.2d 948 (5th Cir. 1959), the Court therein required that before

a stipulation could be dishonored, full protection would first have to be provided to prevent the occurrence of prejudice to either party. In so determining, such Court held:

> "The Court does have the right, and it should never fail to exercise it, to relieve counsel of stipulations to prevent manifest injustice. But the Court is responsible for seeing that suitable protective terms or conditions are imposed to prevent substantial and real harm to the adversary. What those terms or conditions might be no one can forecast. In one case it might be a continuance. In others it might be the making of a new stipulation to permit the receipt in evidence of data or material or statements now relevant and trustworthy, but lacking in some technical admissibility. *Whatever form it takes, the protection must be as full as needed to assure that the authorized change does not subject the adversary to irreparable and irretrievable harm.*" (953)

No protection was provided to either the Petitioner or his trial counsel and both were left exposed and without opportunity to respond to the damaging and prejudicial effect which could reasonably be inferred from the admission of testimony linking Vernell with overt acts charged against Petitioner.

Significantly, the record reflects no reasonable predicate for the trial court's abrogation of the stipulation of the parties, nor does the rationale suggested by the trial judge in anywise justify the same and the consequent extreme prejudice to Petitioner. Certainly, in proffering the testimony of Ralph Harrington, neither Petitioner nor his counsel in anywise violated the stipulation of the

parties and even the trial court noted that such witness took meticulous care not to identify Petitioner's counsel as the driver of the vehicle of which he was an occupant.

It is likewise clear that the testimony of such witness was material and indispensable to Petitioner, and that the matters elicited in his testimony were clearly admissible. Indeed, to have limited the examination of such witness, or to have otherwise precluded his testimony would, in itself, have constituted an unconstitutional denial of Petitioner's right to a fair and impartial trial and to present witnesses in his behalf, in contravention of the Fifth Amendment to the Constitution of the United States.

It is accordingly inconceivable that the calling of such witness, could be considered as a violation, or a cause for the violation, of the court-approved stipulation, as suggested by the Circuit Court in the case at bar. The error of such finding is apparent in considering that all defense counsel participating in the subject stipulation, fully concurred in, and otherwise acknowledged, the propriety of the actions of Petitioner's trial counsel and, in affidavits filed before such court (App. D), each of such counsel stated that it was never their respective understanding that the subject stipulation

> "would and/or could restrict testimony of events following the departure of Holmes and Allison from the Cook residence (the overt act in which Vernell allegedly participated), nor was it your Affiant's understanding that such stipulation would preclude the calling of a witness by any party to testify as to matters related thereto."

In the case at bar, both the Government as well as the defense must be presumed to have been aware of all

matters and facts circumscribed by the subject stipulation. Indeed, the record demonstrates that the presence and participation of both Harrington and the aforementioned girl were well known to the prosecution months prior to the commencement of trial.

Ergo, to preclude any party from calling such witnesses by reading into the subject stipulation matters not embraced therein would be manifestly unfair and unwarranted.

Clearly, each of the parties had an absolute right to both insist and rely upon the enforcement of the subject stipulation. In his own affidavit (App. D), the Petitioner unequivocally stated that without such stipulation he would not have continued with Vernell as trial counsel. The significance of such affidavit is clear in noting that at no time during trial proceedings did the trial court provide any opportunity to Petitioner to engage other counsel.

It is accordingly submitted as not only being improper, but WRONG, that the stipulation could be considered fair to the Government when it was entered into, but unfair when enforcement became necessary.

Albeit, considerations of "fairness to the Government" and unsupported "impressions" as alluded to by the Circuit Court (App. A) cannot possibly serve to balance the manifest prejudice to the Petitioner through the abrogation of the trial court's own court-approved stipulation of the parties. Under the circumstances presented in the case at bar, the violation of such stipulation can only be considered as tantamount to a denial to Petitioner of a fair and impartial trial in contravention of his Fifth Amendment constitutional right to due process.

II — The Constitutional Guarantee of Right to Counsel.

In *Glasser v. United States*, 315 U.S. 60 (1942), this Honorable Court alluded to the importance of one's right to counsel as guaranteed by the Sixth Amendment, and held as follows:

(69) "The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court 'to have the Assistance of Counsel for his defence'. 'This is one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty' and a federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel. Johnson v. Zerbst, 304 U.S. 458, 462, 463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461."

The importance of such right was otherwise stated in *Steadman v. Duff*, 302 F.Supp. 313 (M.D. Fla. 1969), as follows:

"More than any other right guaranteed by the Bill of Rights regarding the function of justice, the right to counsel is paramount, for it is the medium through which all other guarantees are made a reality."

III — The Guarantees Accorded by the Sixth Amendment Require the Effective Assistance of Counsel.

It is significant to note that the mere presence of counsel does not, per se, satisfy the constitutional guarantee of one's right to counsel. In order to fully satisfy such constitutional requirement, effective representation and assistance is a prerequisite.

Such distinction was aptly expressed in *Goodson v. Peyton*, 351 F.2d 905 (4th Cir. 1965), where such court held:

> "The federal constitution guarantees to persons accused of crime in state courts the right to representation by a lawyer. The constitutionally protected right is not satisfied by formalisms; the right is to effective representation." . . . "A lawyer forced, or attempting, to serve masters with conflicting interests cannot give to either the loyalty each deserves."

In considering the prerequisites of effective assistance of counsel, this Honorable Court, in *Glasser v. United States, supra*, admonished that:

(70) ". . . Assistance of Counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired . . ." "If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired."

Where conflict of interests is demonstrated, *as between multiple clients* represented by a single attorney, the courts have consistently determined the same to con-

stitute a denial of effective assistance of counsel, and sufficient to require reversal. *Campbell v. United States*, 122 U.S. App.D.C. 143 (1965), 352 F.2d 359; *Case v. State of North Carolina*, (4th Cir. 1963), 315 F.2d 743; *Craig v. United States*, (6th Cir. 1954), 217 F.2d 355.

Certainly, such principle requires even more rigorous application where the conflict is shown to exist *between the attorney and the client himself*. *U.S. v. Gougis*, 374 F.2d 758 (1967); *Tucker v. United States*, 235 F.2d 238; *Zurita v. United States*, 410 F.2d 477 (1969).

In *Tucker, supra*, the court held it to be sufficient to constitute a denial of counsel that:

> "Because of a prior attorney-client relationship with the bank manager and the possibility that this witness might again be a paying client, Tucker was denied his constitutional right to counsel." (Page 240)

Similarly, in *Zurita, supra*, the court held that allegations regarding defense counsel's business connection with the allegedly robbed bank entitled petitioner to an evidentiary hearing on his motion to vacate sentence, as the allegations might, if true, demonstrate a denial of effective counsel. The court therein stated:

> "[H]is [defendant's] right to counsel under the Constitution is more than a formality, and to allow him to be represented by an attorney with such conflicting interests as existed here without his knowledgeable consent is little better than allowing him no lawyer at all."

> "Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; Goodson v. Peyton, (4th Cir.), 351 F.2d 905. 40 Ill.2d at 112, 113, 239 N.Ed.2d at 443."

Certainly, severe apprehension and concern was necessarily felt by Petitioner's counsel following the Court's *sua sponte* abrogation of the stipulation. Thereafter, and for the remainder of the trial, Petitioner's counsel was subjected to the continued threat of not only having his own integrity impugned, but to suffering the disquieting fear of being wrongfully inculpated in the commission of the crime itself.

Under such circumstances, the anxiety, fear and concern of Petitioner's counsel precluded Petitioner from the unfettered and unhobbled representation to which he was constitutionally entitled, and otherwise served to emasculate the effectiveness of his counsel.

Needless to state, to impugn and otherwise impair the integrity and credibility of one's counsel serves only to emasculate his effective assistance during trial proceedings. In *United States v. Puco*, (2nd Cir. 1971), 436 F.2d 761, the prosecutor, through his method of questioning, placed at issue his own credibility. The Court in such instance deemed the same to be so prejudicial as to make requisite a reversal and consequent new trial. The Court therein held:

> "We find this contention of appellant that prejudicial error was injected here well taken. Using this statement, which was never admitted into

> evidence against either defendant, in this way in effect placed the credibility of the prosecutor himself before the jury and was therefore highly prejudicial."

Indeed, not only was the integrity and credibility of Petitioner's trial counsel besmirched in consequence of the prejudicial and onerous testimony adduced, but in his own evaluation of the same, the trial judge virtually accused such counsel of unlawful activity (App. G), i.e.,

> "THE COURT: And whether you knew it or not, you certainly were aware that they were men that Cook did not call the police to remove, if they were intruders in his home or unwelcome guests, but got his attorney in there to remove them under circumstances which I am frank to say, Mr. Vernell, are strongly indicative of the fact that as his counsel, whether wittingly or unwittingly, you were participating in spiriting away from possible discovery by the police two men who were certainly, from the evidence before me, criminals and recidivists of a very marked degree, and the aroma is not good."

Under such circumstances, the Petitioner must be said to have been deprived of the "effective, competent and adequate representation" essential to his right of counsel. *Wilson v. Phend*, 417 F.2d 1197 (7th Cir. 1969).

IV — In the Absence of Waiver or Judicial Inquiry With Respect Thereto, Petitioner was Constitutionally Entitled to Effective Assistance of Counsel.

Although the Circuit Court in the case **sub judice** conceded both the abrogation of the court-approved stipulation and the consequent prejudice to Petitioner, it nonetheless held the same not to constitute reversible error, upon the theory that the Petitioner had knowledge of such possible conflict and thus waived his constitutional right to unfettered counsel with undivided loyalty. Such court held on pages 11 and 12 of its opinion:

> "In the instant case, however, Cook was fully aware of his attorney's involvement and the prejudice that might flow from revealing such facts to the jury. In spite of this, he expressed a desire that Vernell continue to represent him. We do not believe that such a conscious choice by Cook, with full knowledge of the possible conflict, coupled with a tactical mistake by the defense which made this possibility of conflict a reality, can warrant a mistrial, or a reversal here."

The difficulty with the Court's opinion and holding in this regard is that although the record demonstrates that the Petitioner had knowledge of the basic facts which caused the conflict, the record does not demonstrate that the Petitioner was sufficiently aware of the ramifications of such facts as to justify a knowing waiver of his constitutional right to effective assistance of counsel, *nor were such matters even inquired into by the trial court.* To the contrary, the Petitioner's desire that his counsel continue in the trial of his cause was *expressly conditioned* upon

adherence to the stipulation which was entered into by the parties and approved by the trial court, prior to the commencement of the trial. How then can Petitioner be said to have been aware of the consequences which, through compliance with the stipulation, could never have happened or have otherwise been occasioned?

It is clear that the Circuit Court "presumed" or otherwise "inferred" waiver on the part of Petitioner herein. It is suggested, however, that any such presumption or inference is impermissible.

Where the waiver of one's constitutional right to effective assistance of counsel was at issue, this Honorable Court has consistently decried the propriety of any presumption in favor thereof. In *Glasser v. United States, supra,* it was held:

(70) "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused, Mr. Justice Sutherland said that such duty 'is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree, as the offenses dealt with increase in gravity.' Patton v. United States, 281 U.S. 276, 312, 313, 50 S.Ct. 253, 263, 74 L.Ed. 854, A.L.R. 263. *The trial court should protect the right of an accused to have the assistance of counsel. 'This protect-*

> *ing duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.* While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.' Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461."

Significantly, this Court found in such case that even though Glasser was an attorney, the record did not demonstrate an intelligent and competent waiver by him.

The analogy in *Glasser* is even more apparent where this Court alluded to the necessity on the part of the trial judge "to reascertain Glasser's attitude" when conflict became apparent after the commencement of his trial. As in the case at bar, the trial judge in Glasser was aware at the outset of the possibility of conflict, and rather than protecting Glasser's rights, this Honorable Court determined that the trial judge was responsible for the creation of the situation which resulted in the denial thereof. This Court's opinion in *Glasser* went on to say:

(70) "No such concern on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. *The possibility of the inconsistent interests of Glasser and Kretske was brought home to the court, but instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in the impairment of*

those rights. For the manner in which the parties accepted the appointment indicates that they thought they were acceding to the wishes of the court. Kretske said the appointment could be accepted 'if your Honor wishes to appoint him (Stewart)', and Stewart immediately replied: 'As long as the Court knows the situation. I think there is something in the fact that the jury knows we can't control that.' *The court made no effort to reascertain Glasser's attitude or wishes.* Under these circumstances to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."

In accordingly considering that the possibility of prejudice to Glasser under such circumstances was sufficient to warrant a reversal, this Court further stated:

(75) "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.* Cf. Snyder v. Massachusetts, 291 U.S. 97, 116 54 S.Ct. 330, 336, 78 L.Ed. 674, 90 A.L.R. 575; Tunney v. Ohio, 273 U.S. 510, 535, 41 S.Ct. 437, 445, 71 L.Ed. 749, 50 A.L.R. 1243; Patton v. United States, 281 U.S. 276, 292, 50 S.Ct. 253, 256, 74 L.Ed. 854, 70

A.L.R. 263. And see McCandless v. United States, 298 U.S. 342, 347, 56 S.Ct. 764, 766, 80 L.Ed. 1205. Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's usefulness to Glasser. Nevertheless Stewart was appointed as Kretske's counsel. Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment. This error requires that the verdict be set aside and a new trial ordered as to Glasser."

Similarly, in *Johnson v. Zerbst*, 304 U.S. 458, 463, 464, 58 S.St. 1019, this Court held:

"The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.

"There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that '*courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.* The determination of whether there has been an intelligent waiver

of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.

* * *

"The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

In applying the principles of *Glasser* and *Johnson*, *supra*, it is noted that in the case at bar the record not only negates the presence of any waiver, but affirmatively demonstrates the complete absence thereof. In accordingly alluding to Petitioner's Motion for Remand (App. D), which was filed in response to the Circuit Court's "presumption" of waiver, the attention of the Court is directed to the sworn affidavits of four trial counsel, as well as the Petitioner himself, which clearly reflect that no judicial inquiry was made by the trial court at any time as to Petitioner's "acquiescence to the loss of [sic] such fundamental rights." The trial court further failed to determine whether Vernell adequately apprised his client of the possible loss of effective assistance of counsel due to abrogation of the subject stipulation.

While conceding the awareness of Petitioner as to the presence of Vernell in his home, the record is barren of any evidence which could even suggest that the Petitioner had knowledge of any of the following prejudicial matters elicited during trial proceedings: (1) That Petitioner's counsel drove the co-defendants Holmes and Allison to a motel following their departure from the Cook residence; (2) That such co-defendants paid Vernell the sum of $500.00 for his services and efforts; and, (3) That Petitioner's counsel thereafter represented Urquhart in a criminal proceeding.

In the case of *Lollar v. United States*, 376 F.2d 243 (C.A.D.C. 1967), where the defendant was granted a new trial when it was determined that he had waived his objection to a single attorney representing multiple defendants, the court stated:

> "... when two defendants appear with a single attorney *it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks.* Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the *affirmative* [Court's emphasis] determination that co-defendants have intelligently chosen to be represented by the same attorney ..." (Page 245)

The importance of the role of the trial judge in any determination of a waiver of one's constitutional right is underscored in *Crawford v. Rodriguez*, 373 F.2d 22 (10th Cir. 1967):

"The burden upon the trial judge to assure that a defendant's waiver of counsel is intelligently and understandingly made is outlined in *Shawan v. Cox*, 350 F.2d 909 (10th Cir. 1965): 'He must investigate to the end that there can be no question about the waiver, which should include an explanation of the charge, the punishment provided by law, any possible defenses to the charge or circumstances in mitigation thereof, and explain all other facts of the case essential for the accused to have complete understanding.' "

Such principle was otherwise stated in *McConnell v. United States*, 375 F.2d 905 (5th Cir. 1967), as follows:

(910) "In determining whether there is a competent, informed and intelligent waiver, the judge before whom an accused appears without counsel is charged with a serious responsibility which cannot be perfunctorily performed."

Certainly, in light of the court approved stipulation, the Petitioner could reasonably have concluded that any possible prejudice resulting from his attorney's conflicting interest was fully obviated. Clearly, no waiver can be demonstrated or otherwise inferred from such facts.

Consequently, the only time the issue of waiver could have been considered of moment in the instant case was upon the trial court's abrogation of the stipulation of the parties. On such occasion, however, no waiver, either express or implied, is demonstrated in the record.

In considering the effect of a change in circumstances occurring after a trial has commenced, upon the issue of waiver, the court, in *Craig v. United States*, 217 F.2d 275 (6th Cir. 1954), held:

(359) "We think it follows from the foregoing findings that although Craig was in no way 'deprived' of his right to independent counsel of his own choosing by any act of the District Judge or District Attorney, nevertheless, by reason of a combination of circumstances, not reasonably foreseeable by Court or counsel, he did not receive the effective assistance of counsel to which he was entitled under the Sixth Amendment, and that under the particular circumstances of this case he did not intelligently and voluntarily waive such right."

* * *

"Failure on the part of the accused to properly and timely assert his right may be excusable under certain conditions and not constitute a waiver."

Certainly, silence on the part of an accused is neither tantamount to, nor otherwise infers, waiver. In *United States Ex Rel. Williamson v. Lavaller*, 282 F.Supp. 968 (E.D.N.Y. 1968), such court held:

"In the instant case, petitioner did not learn of the conflict until during the trial, and may not be said to have assented to it by his silence. It is understandable that a criminal defendant, not necessarily familiar with all of his constitutional rights, and not informed of the same by

> the trial judge when the dual representation became apparent, might not interrupt his trial to request that his attorney be relieved even if he was made aware during the course of the trial that a prosecution witness was a client of his attorney."

Significantly, at no time either prior or subsequent to the commencement of trial proceedings did the trial judge in the case at bar conduct any inquiry whatsoever of Petitioner (App. D). Absent such inquiry by the trial judge, waiver cannot possibly be determined, much less presumed. In *Campbell v. United States*, 352 F.2d 359 (D.C. 1965), the court considered the problem as exemplified in a situation of one lawyer and two defendants, and therein held:

> "We have also noted that defendants are unlikely to be sufficiently aware of their rights to object to a possible conflict of interest. Wynn v. United States, 107 U.S. App. D.C. 190, 191, 275 F.2d 648, 649 (1960). And the Supreme Court has stated that the trial judge bears 'the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused,' specifically the right to effective assistance of counsel. Glasser v. United States, 315 U.S. at 71, 62 S.Ct. at 465. The judge's responsibility is not necessarily discharged by simply accepting the co-defendant's designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be de-

> termined, absent inquiry by the trial judge, whether the attorney had made such an appraisal or has advised his clients of the risks. Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the availability of assigned counsel."

A somewhat similar situation to that presented in the case at bar appeared in *Government of the Virgin Islands v. John*, 447 F.2d 69, 74, 75 (3rd Cir. 1971), where the court noted that prejudice due to conflicting interests of counsel became apparent after the commencement of trial proceedings, as follows:

> "The record affirmatively establishes that neither defendants' counsel, the prosecutor nor the trial judge at any time during the trial gave any consideration to the rights of the defendants to "untrammeled and effective representation of counsel', although existence of the conflicting interests of the defendants became apparent when John's pre-trial statement implicating his co-defendants was introduced into the evidence by Government."

The court in such instance went on to say:

> "A defendant is constitutionally entitled to the 'untrammeled and unimpaired' assistance of counsel" for his defense; the right to such as-

> sistance is breached when a defendant's counsel simultaneously represents a co-defendant or co-defendants with 'conflicting interests' or '[i]rrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness;' the right may be "affirmatively waived' but the waiver must be knowingly and intentionally made, and a trial judge is charged with the 'serious and weighty responsibility' 'of determining whether there is an intelligent and competent waiver by the accused;' in doing so the trial judge is to 'indulge every reasonable presumption against the waiver;' and if the trial judge determines that 'proper waiver' has been made, that determination should appear upon the record."

It is submitted that the waiver of one's right to effective assistance of counsel is no less important than the waiver of one's right to counsel and, in either, the record should affirmatively demonstrate that any such waiver was knowingly and intelligently made. In accordingly requiring the record to demonstrate waiver, this Honorable Court, in *Carnley v. Cochran*, 369 U.S. 506, 516, 82 S.Ct. 884 (1962), held:

> "*Presuming waiver from silent record is impermissible. The record must show,* or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

CONCLUSION

It is respectfully submitted that the prejudice resultant to the Petitioner in the case at bar, through no fault of his own, should make requisite the granting of a new trial. For all practical purposes, as result of the abrogation by the trial court of its own court-approved stipulation, the Petitioner was precluded from the effective assistance of counsel to which he was constitutionally entitled. Petitioner has never waived such right, nor does the record support any inference or presumption thereof.

For the reasons herein assigned, the decision of the Fifth Circuit in the case at bar is submitted as being in conflict with the decisions of other courts of appeal, as well as with the applicable decisions of this Court. It is further suggested that the questions raised by the Petitioner herein reflect upon important questions of federal law which should be settled by this Honorable Court.

Petitioner, therefore, respectfully urges this Honorable Court to grant a Petition for Writ of Certiorari in the within cause.

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Attorneys for Petitioner

By
LOUIS VERNELL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to the Office of the Solicitor General, Washington, D.C., and to the Office of the United States Attorney, Ainsley Building, Miami, Florida, this 5th day of August, 1972.

LOUIS VERNELL

Supreme Court, U. S.
FILED
AUG 7 1972
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

NO. 72-219

JOHN CLARENCE COOK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 70-537-Cr-TC

UNITED STATES OF AMERICA,

v.

WILLIAM STAFFORD ALLISON,
RICHARD CARTER CHAPMAN, a/k/a Rick Chapman, a/k/a Henry Chapman,
JOHN CLARENCE COOK,
MARIANNE MOORE COOK, a/k/a Marianne Veronica Cook,
HERMAN GORDON, a/k/a Hy Gordon,
JIMMY JACK HOLMES,
ROY G. RENDERER,
OTTO L. POWERS,

18 USC 371
M/S $10,000 — 5 years
18 USC 641
M/S $10,000 — 10 years
18 USC 2115
M/S $1,000 — 5 years

[Filed 10/28/70]

INDICTMENT

The Grand Jury charges that:

COUNT I

1. On or about the 18th day of December, 1968, and continuously thereafter to and including the date of the filing of this indictment, in the Southern District of Florida, and elsewhere, defendants

WILLIAM STAFFORD ALLISON,
RICHARD CARTER CHAPMAN, a/k/a Rick Chapman, a/k/a Henry Chapman,
JOHN CLARENCE COOK,
MARIANNE MOORE COOK, a/k/a Marianne Veronica Cook,
HERMAN GORDON, a/k/a Hy Gordon,
JIMMY JACK HOLMES,
ROY G. RENDERER,
OTTO L. POWERS,

did wilfully, knowingly and unlawfully combine, conspire, confederate and agree together and with each other, and with diverse other persons whose names are to the Grand Jury unknown, to commit offenses against the United States of America, to wit: (a) to receive, conceal, possess, and sell property of the United States of a value in excess of $100.00, with intent to convert said property to their own use and gain, knowing said property to have been stolen, in violation of Title 18, United States Code, Section 641; (b) to forcibly break into United States post offices with intent to commit in such post offices, larceny and other depredations, in violation of Title 18, United States Code, Section 2115.

2. It was part of said conspiracy that the defendants Jimmy Jack Holmes and William Stafford Allison, for their own use and gain and for the use and gain of the defendants, John Clarence Cook, Roy G. Renderer, Herman Gordon, a/k/a Hy Gordon, Richard Carter Chapman, a/k/a Rick Chapman, a/k/a Henry Chapman, Marianne Moore Cook, a/k/a Marianne Veronica Moore, and Otto L. Powers, with other coconspirators to the Grand Jury unknown, would forcibly break into United States post offices with intent to commit larceny and other depredations therein, and would steal United States postage stamps, United States Savings Stamps, United States Postal Money Orders and other property of the United States of a value in excess of $100.00, for sale and delivery of the defendants, John Clarence Cook, Roy G. Renderer, Herman Gordon, a/k/a Hy Gordon, Richard Carter Chapman, a/k/a Rick Chapman, a/k/a Henry Chapman and Marianne Moore Cook, a/k/a Marianne Veronica Moore.

3. It was further part of said conspiracy that the defendants, John Clarence Cook, Roy G. Renderer, Herman Gordon, a/k/a Hy Gordon, Richard Carter Chapman, a/k/a Rick Chapman, a/k/a Henry Chapman, Marianne Moore Cook, a/k/a Marianne Veronica Moore, and Otto L. Powers for their own use and gain and for the use and gain of other conspirators herein would accept delivery of, and purchase and offer to accept delivery of, and purchase, on a continuing basis, from the said other conspirators United States Postage Stamps, United States Savings Stamps, United States Postal Money Orders, and other property of the United States of a value in excess of $100.00, which the said defendants John Clarence Cook, Roy G. Renderer, Herman Gordon, a/k/a Hy Gordon, Richard Carter Chapman, a/k/a Rick Chapman, a/k/a

Henry Chapman, and Marianne Moore Cook, a/k/a Marianne Veronica Moore, knew had been stolen and would be stolen.

4. It was further part of said conspiracy that the defendants, John Clarence Cook, Roy G. Renderer, Herman Gordon, a/k/a Hy Gordon, Richard Carter Chapman, a/k/a Rick Chapman, a/k/a Henry Chapman, and Otto L. Powers, for their own use and gain and for the use and gain of Otto L. Powers, also named herein as a defendant, would transfer to said Otto L. Powers and other persons whose names are to the Grand Jury unknown United States Postage Stamps, United States Savings Stamps, United States Postal Money Orders and other property of the United States of a value in excess of $100.00 for sale in New York, New York, and elsewhere to Jacob Habib, Ralph Orton, Leonard Messer, and other persons whose names are to the Grand Jury unknown, knowing said stamps to have been stolen.

At the time hereinafter mentioned, the defendants did commit, among others, the following overt acts in furtherance of said conspiracy and to effect the unlawful objectives thereof:

OVERT ACTS

1. On or about December 18, 1968, at Miami, Florida, John Clarence Cook did receive from Jimmy Jack Holmes, United States Postage Stamps valued at $18,000, more or less, which were stolen from the United States Post Office at Sanibel, Florida, on or about December 16, 1968.

2. On or about January 19, 1969, at the home of John Clarence Cook in Miami, Florida, Herman Gordon, a/k/a Hy Gordon, received from Jimmy Jack Holmes approximately $86,000 in United States Postage Stamps stolen by Holmes and William Stafford Allison from the United States Post Office at Brooksville, Florida, on or about January 18, 1969.

3. On or about January 26, 1969, at Miami, Florida, Marianne Moore Cook, a/k/a Marianne Veronica Moore, wife of John Clarence Cook, paid Jimmy Jack Holmes approximately $34,000 in cash which was left at the Cook residence by Herman Gordon, a/k/a Hy Gordon, as payment for approximately $86,000 in United States Postage Stamps stolen from the United States Post Office at Brooksville, Florida, on January 18, 1969.

4. On or about March 28, 1969, at Miami, Florida, John Clarence Cook, received from Jimmy Jack Holmes and William Stafford Allison United States Postage Stamps valued at $40,000 more or less and United States Savings Stamps valued at $3,000 more or less, all stolen from Azalea Park Branch, Orlando, Florida Post Office, on or about March 27, 1969.

5. On or about March 28, 1969 at Miami, Florida, John Clarence Cook, Jimmy Jack Holmes and William Stafford Allison concealed United States Postage Stamps valued at $40,000, more or less, stolen from Azalea Park Branch, Orlando, Florida Post Office on or about March 27, 1969, by throwing a trunk containing the stamps into a body of water near Cook's residence.

6. On or about March 29, 1969, at Miami, Florida, John Clarence Cook and Herman Gordon, a/k/a Hy Gor-

don, recovered from a body of water near Cook's house a trunk containing approximately $40,000 in United States Postage Stamps stolen from Azalea Park Branch, Orlando, Florida Post Office on or about March 27, 1969, and turned over said stamps to Roy G. Renderer.

7. On or about April 4, 1969, at Miami, Florida, Roy G. Renderer sold to Otto L. Powers, United States Postage Stamps valued at $24,000 more or less, which stamps had been stolen from Azalea Park Branch, Orlando, Florida Post Office on or about March 27, 1969.

8. On or about May 7, 1969 at Miami, Florida, John Clarence Cook and Marianne Moore Cook, a/k/a Marianne Veronica Moore, received from Jimmy Jack Holmes, United States Postage Stamps valued at $50,000 more or less, which were stolen from the United States Post Office at Palatka, Florida, on or about May 6, 1969.

9. On or about May 24, 1969, at Miami, Florida, John Clarence Cook received from Jimmy Jack Holmes, United States Postage Stamps valued at $56,000, more or less, which were stolen from the United States Post Office at Forest Park, Georgia, on or about May 23, 1969.

10. On or about June 20, 1969, at Miami, Florida, John Clarence Cook received from Jimmy Jack Holmes, United States Postage Stamps valued at $31,000, more or less, and blank domestic United States Postal Money Orders, Serial Numbers 5,679,794,000 through 5,679,795,-999 inclusive, all stolen from the United States Post Office at Tucker, Georgia, on or about June 19, 1969.

11. On or about June 22, 1969, at Miami, Florida, Roy G. Renderer had in his possession and sold to Otto L.

Powers, United States Postage Stamps valued at $25,000, more or less, which stamps were stolen from the United States Post Office at Tucker, Georgia, on or about June 19, 1969.

12. On or about July 15, 1969, at Miami, Florida, John Clarence Cook received from Jimmy Jack Holmes, United States Postage Stamps valued at $28,000, more or less, which were stolen from Ardmore Station, Winston-Salem, North Carolina Post Office, on or about July 13, 1969.

13. On or about August 19, 1969, at Miami, Florida, John Clarence Cook received from Jimmy Jack Holmes, United States Postage Stamps valued at $55,000, more or less, which were stolen from the North Side Station, Atlanta, Georgia Post Office, on or about August 18, 1969.

14. On or about September 8, 1969, at Miami, Florida, John Clarence Cook received from Jimmy Jack Holmes, United States Postage Stamps valued at $12,000, more or less, which were stolen from the Biltmore Station, Ashville, North Carolina Post Ofice, on or about September 7, 1969.

15. On or about December 2, 1969, at Miami, Florida, John Clarence Cook received from Jimmy Jack Holmes, United States Postage Stamps valued at approximately $12,000 stolen from Seminole Heights Station, Tampa, Florida Post Office, on or about December 1, 1969.

16. On or about December 4, 1969, at Miami, Florida, Richard Carter Chapman, a/k/a Rick Chapman, a/k/a Henry Chapman, and Roy G. Renderer received and sold

to Otto L. Powers, United States Postage Stamps valued at $12,000, more or less, stolen from Seminole Heights Station, Tampa, Florida Post Office, on or about December 1, 1969.

17. On or about March 25, 1970, at Miami, Florida, Roy G. Renderer received from Jimmy Jack Holmes United States Savings Stamps valued at approximately $3,250, including $1,200 in Savings Stamps, stolen from Seminole Heights Station, Tampa, Florida Post Office, on December 1, 1969.

18. On or about May 1, 1970, at Miami, Florida, Roy G. Renderer sent a Western Union Money Order in the amount of $1,500, more or less, from Miami, Florida, to Shirley Bishop, Macon, Georgia, for Jimmy Jack Holmes as payment for approximately $3,250 in United States Savings Stamps, stolen from United States Post Offices, including $1,200 worth of Savings Stamps stolen from Seminole Heights Station, Tampa, Florida Post Office, on or about December 1, 1969.

All in violation of Title 18, United States Code, Section 371.

COUNT II

On or about January 19, 1969, at Miami, Florida, defendant

HERMAN GORDON
a/k/a Hy Gordon

did with intent to convert to his own use and gain, receive and possess United States Postage Stamps valued at approximately $86,000 stolen from the United States Post

Office at Brooksville, Florida, on or about January 18, 1969, knowing said stamps to have been stolen; in violation of Title 18, United States Code, Section 641.

COUNT III

On or about March 28, 1969, at Miami, Florida, defendant

JOHN CLARENCE COOK

did knowingly and unlawfully receive, conceal, and possess with intent to convert to his own use and gain, United States Postage Stamps valued at $40,000, more or less, stolen from Azalea Park Branch, Orlando, Florida Post Office, on or about March 27, 1969, knowing said stamps to have been stolen; in violation of Title 18, United States Code, Section 641.

COUNT IV

On or about April 4, 1969, at Miami, Florida, defendants

HERMAN GORDON,
a/k/a Hy Gordon, and
ROY G. RENDERER

did knowingly and unlawfully with intent to convert to their own use and gain, have in their possession and sell to Otto L. Powers United States Postage Stamps valued at $24,000, more or less, stolen from the Azalea Park Branch, Orlando, Florida Post Office, on or about March 27, 1969, knowing said stamps to have been stolen; in violation of Title 18, United States Code, Section 641.

COUNT V

On or about June 20, 1969, at Miami, Florida, defendant

JOHN CLARENCE COOK

did knowingly and unlawfully receive, conceal, and possess with intent to convert to his own use and gain, United States Postage Stamps valued at approximately $31,000, more or less, stolen from the United States Post Office at Tucker, Georgia, on or about June 19, 1969, knowing said stamps to have been stolen; in violation of Title 18, United States Code, Section 641.

COUNT VI

On or about June 22, 1969, at Miami, Florida, defendant

ROY G. RENDERER

did knowingly and unlawfully have in his possession and sell to Otto L. Powers with intent to convert to his own use and gain, United States Postage Stamps valued at $25,000, more or less, which had been stolen from the United States Post Office at Tucker, Georgia, on or about June 19, 1969, knowing said stamps to have been stolen; in violation of Title 18, United States Code, Section 641.

COUNT VII

On or about July 15, at Miami, Florida, defendant

JOHN CLARENCE COOK

did knowingly and unlawfully with intent to convert to

his own use and gain, receive United States Postage Stamps valued at $25,000, more or less, stolen from Ardmore Station, Winston-Salem, North Carolina Post Office, on or about July 13, 1969, knowing said stamps to have been stolen; in violation of Title 18, United States Code, Section 641.

COUNT VIII

On or about December 4, 1969, at Miami, Florida, defendants

ROY G. RENDERER and
RICHARD CARTER CHAPMAN,
a/k/a Rick Chapman,
a/k/a Henry Chapman,

did knowingly and unlawfully with intent to convert to their own use, receive, conceal, possess and sell to Otto L. Powers, United States Postage Stamps valued at approximately $12,000, which were stolen from Seminole Heights Station, Tampa, Florida Post Office, on or about December, 1, 1969, knowing said stamps to have been stolen; in violation of Title 18, United States Code, Section 641.

COUNT IX

On or about March 25, 1970, at Miami, Florida, defendant

ROY G. RENDERER

did unlawfully and knowingly with intent to convert to his own use and gain, receive and possess United States Savings Stamps valued at $1,200, more or less, which were stolen from Seminole Heights Station, Tampa, Florida

Post Office, on or about December 1, 1969, knowing said stamps to have been stolen; in violation of Title 18, United States Code, Section 641.

A TRUE BILL

Signature Illegible

Deputy Foreman

ROBERT W. RUST
UNITED STATES ATTORNEY

/s/ Lloyd G. Bates, Jr.

Assistant United States Attorney

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN CLARENCE COOK,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 1, 1972)

Before PHILLIPS,* THORNBERRY and RONEY,
Circuit Judges.

THORNBERRY, Circuit Judge: John Clarence Cook appeals from his conviction pursuant to an indictment charging him with one count of conspiring to burglarize post offices and to receive, possess, and sell property stolen from the United States, and three substantive counts of possessing and concealing such property. In all, eight defendants were originally indicted for the conspiracy and

*Of the Tenth Circuit, sitting by designation.

various individual substantive counts. After various guilty pleas, deaths, and dismissals, only Cook and defendants Chapman and Renderer went to trial.[1] Chapman and Renderer were granted directed verdicts on the conspiracy charge at the close of the government's case, leaving only Cook before the jury on this count.

The evidence introduced at trial indicates the following. On December 16, 1968, Jimmy Jack Holmes, an accomplished thief of some repute, with an accomplice, embarked on what proved to be a profitable venture. On that date, Holmes, accompanied by Willie Urquhart, burglarized a post office in Sanibel, Florida, from which he stole approximately $17,000 in unused postage stamps. The loot was taken to Miami, Florida, where Holmes, as a result of an earlier phone call to Bill Urquhart, his Tampa "connection," contacted defendant Cook. Arrangements were made for a meeting between Cook and the burglar at a local Toddle House, where an agreement was made that Holmes was to receive in return for the stolen merchandise thirty-five per cent of the stamps' face value. The parties proceeded then to Cook's residence, where the stamps and approximately $5,500 were exchanged.

On January 18, 1969, Holmes, with Willie Urquhart and another burglar, Stafford Allison, committed a second burglary at a post office in Brooksville, Florida. The stamps stolen at this burglary, worth approximately $87,000, were also taken to Miami. Holmes phoned Cook's residence and was told by Cook's wife that her husband

[1]On the conspiracy count. the government originally indicted William Allison, Rick Chapman, Marianne Cook, Herman Gordon, Jimmy Jack Holmes, Roy Renderer, Otto Powers, and appellant here. Gordon died prior to trial; and defendants Holmes, Allison, and Powers pleaded guilty. The charges were dismissed against Marianne Cook.

was not present but that another fence would be made available if the burglars would come on over. Upon arriving at the Cook residence, Holmes met Herman (Hy) Gordon and his partner, defendant Chapman, who purchased the stamps for an agreed price of $32,000, or thirty-five per cent of their face value. Gordon paid Holmes $3,000 as a down payment, and Holmes returned to the Cook residence a week later and was paid an additional $29,000 by Cook's wife.

On March 27, 1969, Holmes, Allison and Urquhart executed a third burglary at the Azalea Park post office in Orlando, Florida. Shortly thereafter, at approximately 12:30 a.m., the burglars arrived at the Cook residence. Allison and Holmes took a foot locker containing the stolen stamps, in the face amount of $40,000, into Cook's house while Urquhart waited in the car. A police car arrived in front of the house shortly thereafter, and the police arrested Urquhart as Holmes and Allison watched from the window of the house. Cook ordered the burglars to get rid of the merchandise, and the burglars complied by throwing the locker into a canal in back of Cook's house. Approximately two weeks later, Cook represented to Holmes that he, along with another unidentified party, had fished the water-soaked stamps out of the canal but had received only $3,000 for their sale. He further stated that he had paid $1,500 to his fellow fisherman and offered to split the remaining $1,500 with Holmes. At about this same time, approximately the same quantity of water-soaked stamps turned up in the hands of defendant Renderer, who ultimately hold them to Otto Powers at the low rate of twenty-five per cent of their face value because of their water-soaked condition. Powers later pleaded guilty to the conspiracy count of the indictment.

The government proved that Holmes, acting with various other individuals, committed seven other post office burglaries. In each case, the proceeds were brought to Miami and sold directly to Cook or, in Cook's absence, to another party at Cook's residence. On two other occasions, stamps in the approximate amount of those taken in the burglaries subsequently turned up in the hands of Renderer, Chapman, or both. Powers was each time summoned from his home in Tampa by Renderer and purchased the stolen merchandise for approximately seventy per cent of its face value. Powers in turn would transport the stamps to New York where they were sold to various retailers for eighty per cent of their face value. Upon Powers' return to Miami, his supplier was paid the originally agreed price. In addition to these transactions, Powers admitted having had three direct transactions with Holmes for the purchase of post office burglary proceeds.

Cook first complains of a fatal variance between the language of the indictment and the proof adduced at trial and of the trial court's refusal to sever his trial from that of Chapman and Renderer. Both these complaints are based on defendant's contention that he was charged with a single conspiracy, whereas two separate conspiracies were proven —one to burglarize post offices and to distribute the loot. The indictment charges a conspiracy to burglarize post offices and alleges that a part of the conspiracy was the intent to distribute the proceeds of the burglaries.[2] Assuming that the indictment alleged, or the evidence showed, separate conspiracies, each of which was participated in by

[2]The indictment, in pertinent part, charges as follows:

Count I

1. On or about the 18th day of December, 1968, and continuously thereafter to and including the date of the filing of this

some but not all of the named members, we do not deem Cook to have been prejudiced by his being tried with Chapman and Renderer. Defendant's reliance on Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), is misplaced. Kotteakos required that such a variance affect substantial rights by creating the possibility

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indictment, in the Southern District of Florida, and elsewhere, defendants

William Stafford Allison
Richard Carter Chapman, a/k/a Rick Chapman, a/k/a Henry Chapman
John Clarence Cook
Marianne Moore Cook, a/k/a Marianne Veronica Cook
Herman Gordon, a/k/a Hy Gordon
Jimmy Jack Holmes
Roy G. Renderer
Otto L. Powers

did wilfully, knowingly and unlawfully combine, conspire, confederate and agree together and with each other, and with diverse other persons whose names are to the Grand Jury unknown, to commit offenses against the United States of America, to wit: (a) to receive, conceal, possess, and sell property of the United States of a value in excess of $100.00, with intent to convert said property to their own use and gain, knowing said property to have been stolen, in violation of Title 18, United States Code, Section 641; (b) to forcibly break into United States post offices with intent to commit in such post offices, larceny and other depredations, in violation of Title 18, United States Code, Section 2115.

2. It was part of said conspiracy that the defendants Jimmy Jack Holmes and William Stafford Allison, for their own use and gain and for the use and gain of the defendants, John Clarence Cook, Roy G. Renderer, Herman Gordon, a/k/a Hy Gordon, Richard Carter Chapman, a/k/a Rick Chapman, a/k/a Henry Chapman, Marianne Moore Cook, a/k/a Marianne Veronica Moore, and Otto L. Powers, with other coconspirators to the Grand Jury unknown, would forcibly break into United States post offices with intent to commit larceny and other depredations therein, and would steal United States postage stamps, United States Savings Stamps, United States Postal Money Orders and other property of the United States of a value in excess of $100.00, for sale and delivery to the defendants, John Clarence Cook, Roy G. Renderer, Herman Gordon, a/k/a Hy Gordon, Richard Carter Chapman, a/k/a Rick Chapman,

of a transfer of guilt from one group of conspirators to another unconnected group. Assuming only separate conspiracies were shown, a review of the record in the instant case convinces us that sufficient evidence was introduced to prove Cook's participation in both the conspiracy to burglarize and the conspiracy to distribute the proceeds.[3]

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a/k/a Henry Chapman, and Marianne Moore Cook, a/k/a Marianne Veronica Moore.

3. It was further part of said conspiracy that the defendants, John Clarence Cook, Roy G. Renderer, Herman Gordon, a/k/a Hy Gordon, Richard Carter Chapman, a/k/a Rick Chapman, a/k/a Henry Chapman, Marianne Moore Cook, a/k/a Marianne Veronica Moore, and Otto L. Powers for their own use and gain and for the use and gain of the other conspirators herein would acept delivery of, and purchase and offer to accept delivery of, and purchase, on a continuing basis, from the said other conspirators, United States Postage Stamps, United States Savings Stamps, United States Postal Money Orders, and other property of the United States of a value in excess of $100.00, which the said defendants John Clarence Cook, Roy G. Renderer, Herman Gordon, a/k/a Hy Gordon, Richard Carter Chapman, a/k/a Rick Chapman, a/k/a Henry Chapman, and Marianne Moore Cook, a/k/a Marianne Veronica Moore, knew had been stolen and would be stolen.

4. It was further part of said conspiracy that the defendants, John Clarence Cook, Roy G. Renderer, Herman Gordon, a/k/a Hy Gordon, Richard Carter Chapman, a/k/a Rick Chapman, a/k/a Henry Chapman, and Otto L. Powers, for their own use and gain and for the use and gain of Otto L. Powers, also named herein as a defendant, would transfer to said Otto L. Powers and other persons whose names are to the Grand Jury unknown United States Postage Stamps, United States Savings Stamps, United States Postal Money Orders and other property of the United States of a value in excess of $100.00 for sale in New York, New York, and elsewhere to Jacob Habib, Ralph Orton, Leonard Messer, and other persons whose names are to the Grand Jury unknown, knowing said stamps to have been stolen.

[3]Cook claims that there was no evidence to connect him to any of the burglaries other than proof that he purchased the proceeds. We recognize that, absent an agreement to advance a joint interest, such purchases and sales of stolen property would normally not constitute conspiratorial activity. See United States v. Ford, 7th Cir. 1963, 324 F.2d 950; United States v. Zevli, 2d Cir. 1943, 137 F.2d 845; United States v. Koch, 2d Cir. 1940, 113 F.2d 982. In the instant case, how-

Under such circumstances, Cook could not have been prejudiced by being tried with both sets of conspirators. See United States v. Walker, 5th Cir. 1972, ____ F.2d ____ [No. 71-2165, January 11, 1972]; Monroe v. United States, D.C. Cir. 1956, 234 F.2d 49.

Cook next contends that his conviction must be reversed because Holmes, Allison, and Powers, defendant's co-conspirators, testified that they had earlier pleaded guilty to the same conspiracy charged to defendant. In United States v. Harrell, 5th Cir. 1970, 436 F.2d 606, this Court reversed appellant's conviction in part on the basis that evidence of his co-conspirator's guilty plea was admitted by the court without proper foundation or instruction. A reversal was required despite the fact that, as in the instant case, defendant's counsel made no objection at the time of the revelation and made no subsequent request to the court for a limiting instruction. We assume without in any way deciding that Harrell, wherein the only person possibly a co-conspirator of defendant was forced to testify as to his prior guilty plea, is analogous to the instant case, wherein the admissions of Holmes, Allison, and Powers did not necessarily indicate participation by Cook. We nevertheless find no error here because Cook's attorney himself caused the evidence of the witnesses' guilty pleas to enter the case. The primary contention of the defense throughout the trial was that the testimony of these alleged co-conspirators was perjured in order that they might receive lighter

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ever, proof was adduced that after one of the burglaries in question Cook requested Holmes to bring back some blank money orders on the next trip, and Holmes carried out the request. This evidence, coupled with the continuing nature of the activities between Holmes and Cook, fully support an inference that they were engaged in a conspiracy to burglarize post offices and distribute the proceeds for their mutual benefit.

sentences for their crimes. To prove this "deal," it was necessary to show their pleas and the light sentences received.[4] This Cook's defense counsel attempted with full vigor. He cannot so act and then sit back and hope that the trial court fails to give the limiting instructions required by Harrell.

Cook next complains that the prosecution and the trial judge allegedly violated a pre-trial stipulation and thereby prejudiced his case. This contention is based on the following facts. After the arrival of the police and Willie Urquhart's arrest at the Cook residence following the Azalea Park burglary, discussed previously, Cook called his attorney Vernell, who later represented him at trial. After the police left the neighborhood, Vernell arrived with a girl and another friend, Harrington, and took Holmes and Allison away with him.

Before trial, in order to avoid embarrassment to Vernell and to allow him to continue as defense attorney in accordance with Cook's wishes, the government agreed that the burglars, Holmes and Allison, would make no mention of any occurrences subsequent to their leaving Cook's residence. This was accomplished by the witnesses' simply stating, without further elaboration, that they left Cook's house after the incident. Vernell, however, during the presentation of the defendant's case, put Harrington on the stand. Harrington testified that after leaving Cook's house on the night in question, Holmes and Allison indi-

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[4]In Harrell, the Court made clear that:

> We are not here at all concerned with the case where proof of a co-defendant's guity plea is offered for a recognized evidentiary purpose, [For instance, as impeachment of trial testimony, or as affecting credibility of a witness because of previous felony conviction].

436 F.2d at 614 & n.9 (emphasis added).

cated by their conversations that Cook had known nothing of their illegal activity and wished no part in it. During his testimony, Harrington continually emphasized the presence of a third party, who was repeatedly referred to as the "party who I was with." The trial court, finding this to be an attempt by Cook's attorney to infer that the previous witnesses had withheld certain information from the government or that the government had something to hide, allowed Harrington to testify that Vernell was present at the time. The trial judge then informed the jury that the information was withheld from them to avoid embarrassing Vernell and to allow him to continue as counsel for Cook. Moreover, Holmes was recalled to the stand and testified, in refuting Harrington's testimony, that Vernell had arranged for their motel accommodations on the night in question and had represented himself as their attorney when they were stopped by the police a short distance from the Cook residence.

Cook urges that the act of the trial court was a violation of the pre-trial stipulation and destroyed his attorney's credibility in the eyes of the jury. We have no doubt that revealing this incident resulted in prejudice to Cook, but despite our sympathy with the defendant under such circumstances, we must agree with the trial court's ruling. Although the stipulation was violated, it is clear that Cook's attorney himself did the violating, or at least caused the violation by his actions. Upon Harrington's testimony, it was essential in all fairness to the government to inform the jury fully of the occurrence and the reason for its not being disclosed in order to destroy the impression thus created. The only other alternative available to the trial court was the granting of a mistrial. It is clearly established that a mistrial should not be granted for

prejudice flowing from a defense attorney's tactics which are prejudicial to his own case. See United States v. Wilson, 5th Cir. 1971, 439 F.2d 1081; United States v. Greenberg, 3d Cir. 1969, 419 F.2d 808; United States v. Licausi, 5th Cir. 1969, 413 F.2d 1118. If this were not so, it would be easy to envision a halt to the entire criminal process. Under these circumstances, therefore, the trial judge must have discretion to admit rebuttal evidence to meet an issue raised by the defendant. See O'Brien v. United States, 5th Cir. 1969, 411 F.2d 522; Cotton v. United States, 8th Cir. 1966, 361 F.2d 673.

We recognize that a defendant is entitled to counsel freed from interests which might conflict with the interests of his client. Glasser v. United States, 315 U.S. 827, 62 S.Ct. 629 (1942); United States v. Puco, 2d Cir. 1971, 436 F.2d 761; Randazzo v. United States, 5th Cir. 1964, 339 F.2d 79; Greenberg v. United States, 5th Cir. 1960, 280 F.2d 472. In the instant situation, Vernell may have felt that it was necessary to protect his own interests in addition to those of his client. In Porter v. United States, 5th Cir. 1962, 298 F.2d 463, this Court stated:

> The Constitution assures a defendant effective representation by counsel whether the attorney is one of his choosing or court-appointed. Such representation is lacking, however, if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents—as a vigorous advocate having the single aim of acquittal by all means fair and honorable—are hobbled or fettered or restrained by commitments to others.

298 F.2d at 463 (emphasis added). In the instant case, however, Cook was fully aware of his attorney's involvement and the prejudice that might flow from revealing such facts to the jury. In spite of this, he expressed a desire that Vernell continue to represent him. We do not believe that such a conscious choice by Cook, with full knowledge of the possible conflict, coupled with a tactical mistake by the defense which made this possibility of conflict a reality, can warrant a mistrial, or a reversal here.

Cook finally argues that he was prejudiced by the trial court's attitude toward and statements to and about his attorney during the trial. After a careful review of the record, we find that most of the statements complained of occurred outside the presence of the jury and the remainder were warranted, or at least not prejudicial. See United States v. Del Toro, 5th Cir. 1970, 426 F.2d 181; Luttrell v. United States, 5th Cir. 1963, 320 F.2d 462.

Accordingly, we AFFIRM.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
IN AND FOR THE FIFTH CIRCUIT

CASE NO. 71-3367

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN CLARENCE COOK,
Defendant-Appellant.

PETITION FOR RE-HEARING

JOHN CLARENCE COOK, Defendant-Appellant in the above-entitled cause, herewith petitions this Honorable Court to grant a re-hearing in the within cause, respectfully showing as follows.

POINTS RELIED UPON

On June 1st, 1972, this Honorable Court rendered its opinion affirming the conviction entered against Defendant-Appellant in the United States District Court for the Southern District of Florida, Miami Division, wherein adjudications of guilt were entered against the Defendant-Appellant on both the conspiracy count and the three substantive counts as contained in the indictment. The

Defendant-Appellant will be referred to herein as the "Defendant," while the Plaintiff-Appellee will be referred to herein as the "Government."

For the reasons hereinafter assigned, the Defendant verily believes and, accordingly, respectfully submits that the subject opinion of the Court is in error in the following respects:

1 — In its opinion, the Court determined that even "assuming only separate conspiracies were shown: in the case at bar, the Defendant "could not be prejudiced by being tried with both sets of conspirators." In so determining, the Court rejected the applicability of Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), and as noted, relied upon the decisions rendered in United States v. Walker, (5th Cir. 1972), ____ F.2d ____, and Monroe v. United States, (D.C. Cir. 1956), 234 F.2d 49. Inasmuch as the acts and participation of the Defendant in one of the conspiracies alluded to, neither overlap nor otherwise encompass a conspiratal acts with respect to any of the other conspiracies demonstrated in the record, it is submitted that the consequent joinder of such unrelated conspiracies was prejudicial to the extent as to require a reversal.

2 — In its opinion, the Court determined that the guilty pleas and "admissions of Holmes, Allison and Powers did not necessarily indicate participation by Cook," and further determined that the Defendant's attorney "himself caused the evidence of the witness(es)' guilty pleas to enter the case." It is submitted that in receiving such guilty pleas and admissions of all three of such co-defendants into evidence, with respect to the same Count I for which the Defendant was charged, the same made requisite and otherwise impelled a finding of the Defendant's participation

therein. The Defendant further submits that the record demonstrates that it was the Government prosecutor who initially caused the evidence of such pleas to enter the case, and that the use of such pleas by Defendant's counsel for impeachment purposes followed not only direct examination of such witnesses but also the cross-examination of other counsel for the co-defendants on such matters.

3 — The Court's opinion further determined that the Court-approved stipulation concerning reference to Defendant's counsel was entered into "in order to avoid embarrassment to Vernell and to allow him to continue as defense attorney," and that the same contemplated an agreement that the parties "would make no mention of any occurrences subsequent to their leaving Cook's residence." It is respectfully submitted that the stipulation entered into and made a part of the record did not preclude reference to occurrences subsequent to the departure of Holmes and Allison from Cook's residence, but only encompassed an agreement not to mention the name of Cook's counsel during the trial of the cause. The Defendant further suggests that the reason for the stipulation was "not to avoid embarrassment to Vernell," but to preclude the necessity for his appearance in the trial as both a witness and counsel in the cause.

4 — The opinion of the Court otherwise and further determined that despite the prejudice attaching to the Defendant through repeated reference made to Defendant's counsel in the trial of the cause, the same could not warrant a reversal or a mistrial in view of the Defendant's alleged awareness and knowledge "of his attorney's involvement and the prejudice that might flow from revealing such facts to the jury."

ARGUMENT

1 — Although the opinion of the Court acknowledges the presence of separate conspiracies, with distribution of the proceeds of the various post office burglaries being made to individuals other than the Defendant, e.g., sales directly to the co-defendant Powers, the Court rejected the Defendant's argument of prejudicial error with respect thereto and the applicability of pronouncements made in Kotteakos, supra.

It is significant to note that with respect to the several conspiracies demonstrated in the record, only Holmes and Allison constituted the "hub" men in each of the conspiracies, and that the Defendant's relationship and participation related solely to the sales made by such individuals to himself.

Albeit, the conspiracies demonstrated to exist in the within cause reflect upon conspiratal acts neither engaged in by the Defendant, nor otherwise known to him. Such distinguishing feature appears to resolve the subject issue in Defendant's favor in the case cited by the Court in its opinion, i.e., Monroe v. United States, where that Court held:

> "Not only in Kotteakos was the "hub" man out of the case when it reached the appellate courts, while here the two "hub" mean are the only ones now involved in the question, but, as we have outlined, the scheme of Monroe and Prather extended to all that was proved respecting the conspiracy. They were not surprised, nor were their substantial rights otherwise prejudiced by the alleged variance."

Certainly, the conspiracy demonstrated in the record to exist between Holmes, Allison and Powers in the sales made solely to Powers without participation or knowledge of the Defendant Cook, which were freely admitted to by such co-defendants, can only be said to be prejudicial to the Defendant Cook, especially where the same three co-defendants pled guilty to the same Count I as charged aganist the Defendant.

2 — As noted with respect to point 2 herein, urged by the Defendant, the co-defendants Holmes, Allison and Powers pled guilty to the same Count I wherein the Defendant was charged with conspiracy. Certainly, receipt of such guilty pleas is tantamount to admitting the facts alleged in Count I of the indictment, which not only directly implicates the Defendant, but virtually precludes any inference or conclusion other than the Defendant's participation therein. In any event, the record demonstrates that it was the Government's attorney who initially alluded to the guilty pleas of each of such co-defendants, prior to the cross-examination of any of such co-defendants by counsel for the Defendant (A-192 with respect to the co-defendant Holmes; A-491, 492 with respect to the co-defendant Allison; and A-567 with respect to the co-defendant Powers). The Defendant further suggests that even preceding his own inquiry as to such subject matter, counsel for the other co-defendants on trial examined the co-defendants relative to such guilty pleas, i.e., A-299-302, fendant Renderer of the co-defendant Holmes, and A-625 representing cross-examination by counsel for the co-defendant Renderer of the co-defendant Powers. Indeed, counsel for the Defendants made no inquiry whatsoever of the co-defendants Allison and Powers with respect to their entry of guilty pleas.

Needness to state, the introduction into evidence of the guilty pleas of such co-defendants can not appropriately be attributed to the Defendant or his counsel and, as the record demonstrates, any reference to such guilty pleas by Defendant's counsel can only be regarded as both nominal and insignificant when compared to the impact of such evidentiary matter in the oft-repeated instructions of the trial court with respect thereto.

3 — Although the Court determined that the stipulation agreed to by the Defendant contemplated that "no mention of any occurrences subsequent to" the departure of Holmes and Allison from Cook's residence would be made, the only stipulation agreed to by the Defendant or his counsel related to an agreement not to mention the name of Defendant's counsel during trial of the subject cause. (A-60-63). In consideration for such agreement, the only concession made by the Defendant was that his attorney would "not take the stand." (A-63). There was absolutely no reference made in such stipulation or agreement to any requirement that the circumstances related to the departure of the co-defendants Holmes and Allison from the Cook residence would not be mentioned. Significantly, the record demonstrates that both the Defendant and his counsel adhered to the stipulation and restricted both the cross-examination of the Government's witnesses and the Defendant's own witnesses accordingly. Contrary to the trial court's finding that the reason for the stipulation was to save embarrassment to Defendant's counsel, the sole reason for the same was to preclude the necessity for such counsel taking the stand as a witness in a trial in which he was also the attorney. Aside from the fact that such dual role of an attorney is not permissible under the applicable canons of ethics, even the trial judge through-

out the trial of the cause admonished counsel that he could not take two positions in the cause, i.e., both witness and attorney.

Although the Court noted that the co-defendant Holmes was recalled to the stand, none of his testimony refuted the statements made by the witness Harrington as to the conversations which such witness stated he overheard. In addition, there is little or no reason to attribute the omission of the name of defense counsel to any attempt on the part of the Government to hide something, when the onus, if any, of such omission would be equally applicable to the Defendant as well.

4 — Significantly, the opinion of the Court determined as a factual matter that there, in fact, existed a conflict between the interests of the Defendant and his attorney, and that such conflict "resulted in prejudice" to the Defendant.

Needless to state, these factors are, per se, usually deemed sufficient to warrant a reversal. However, as noted in the instant case, the Court held the same not to constitute reversible error, upon the theory that the Defendant had knowledge of such possible conflict and thus waived his constitutional right to counsel with undivided loyalty.

The difficulty with the Court's opinion and holding in this regard is that although the record demonstrates that the Defendant had knowledge of the basic facts which caused the conflict, the record does not demonstrate that the Defendant was sufficiently aware of the ramifications of such facts as to justify a knowing waiver of his constitutional right to effective assistance of counsel, nor

were such matters even inquired into by the trial court of the Defendant. To the contrary, the Defendant's desire that his counsel continue in the trial of his cause was expressly conditioned upon adherence to the stipulation which was entered into by the parties and approved by the trial court, prior to the commencement of the trial. How can the Defendant be said to have been aware of the consequences which, through compliance with the stipulation entered into, could never have happened or have been occasioned?

The right to effective assistance of counsel is so fundamental to a fair trial that such right is not deemed waived unless the record clearly demonstrates a knowing waiver. Miranda v. Arizona, 384 U.S. 436; Carnley v. Cochran, 369 U.S. 506; Glasser v. United States, 315 U.S. 60. See also United States v. Pordum, 451 F.2d 1015 (2 Cir. 1971). There the court held no waiver of counsel even though defendant, appearing pro se, was himself a lawyer. In regard to matters of which a non-lawyer might not recognize the ramifications, knowledge of the basic fact is not equivalent with the necessarily legal significance to justify a finding of sufficient "knowledge." U.S. ex rel Raymound v. Illinois, 455 F.2d 62, (7 Cir. 1972). There, on the issue of the duty to disclose exculpatory evidence, the court held that disclosure of evidence, the meaning of which might not be comprehended by the defendant, a layman, did not satisfy the prosecutor's duty. Applied to the issue or conflict of counsel, this principal must require, before waiver can be applied, that defendant—not trained in the law—is clearly knowledgeable of the possibility of conflict and the ramifications and specifically waives his right. United States v. Pordum (supra).

The proceedings concerning the discussion between defense counsel, the prosecutor and the court are found in the Appendix, pp. 60-63. There is totally lacking any question by the Court to Defendant as to whether he was knowledgeable of the extreme risk involved in proceeding with a counsel who himself might be a suspect, and thereby endanger his defense. There was not the careful interrogation of the Defendant as in United States v. Sheiner, 410 F.2d 337 (2 Cir. 1969) which found sufficient to base a finding of knowing waiver.

In Campbell v. United States, 352 F.2d 359 (D.C. 1965), the court considered the problem exemplified by the situation of one lawyer and two defendants. The court said:

> "We have also noted that defendants are unlikely to be sufficiently aware of their rights to object to a possible conflict of interest. Wynn v. United States, 107 U.S. App. D.C. 190, 191, 275 F.2d 648, 649 (1960). And the Supreme Court has stated that the trial judge bears "the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused," specifically the right to effective assistance of counsel. Glasser v. United States, 315 U.S. at 71, 62 S.Ct. at 465. The judge's responsibility is not necessarily discharged by simply accepting the co-defendant's designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the at-

> torney had made such an appraisal or has advised his clients of the risks. Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the availability of assigned counsel."

No inquiry, as suggested by Campbell, occurred in this cause.

Here, the Court of Appeals presumed a knowing waiver of the right to effective assistance of counsel from the mere fact of counsel having retained the attorney. Waiver cannot be assumed from counsel being the defendant's choice. United States v. Craig, 217 F.2d 355. Nor can waiver be presumed from the status of the record, for the facts do not support a finding of knowing waiver. Johnson v. Zerbst, 304 U.S. 458.

CONCLUSION

For the reasons herein assigned, the defendant respectfully prays that this Honorable Court will grant a re-hearing in the within cause, and that upon such re-hearing, the judgment of the trial court should be reversed.

Respectfully submitted,

GEORGE GOLD
Biscayne Building
19 W. Flagler Street
Miami, Florida 33131
and
LOUIS VERNELL
407 Lincoln Road—Suite 10-L
Miami Beach, Florida 33139

By: /s/ George Gold
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Re-hearing was mailed to the Office of the U.S. Attorney, Ainsley Building, Miami, Florida, this ____ day of June, 1972.

/s/ George Gold
GEORGE GOLD

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 71-2495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN CLARENCE COOK,
Defendant-Appellant.

MOTION FOR REMAND TO EVIDENTIARY HEARING

The Appellant, JOHN CLARENCE COOK, by and through his undersigned attorney, respectfully shows unto this Honorable Court as follows:

1 — That on June 1st, 1972, this Honorable Court entered its Opinion affirming the judgments of conviction as entered against the within Appellant.

2 — That in its Opinion, this Honorable Court presumed and otherwise presupposed that the Appellant, through his counsel, violated the Court-approved stipulation of the parties.

3 — That in its said Opinion, this Court otherwise erroneously presumed and presupposed that the within Appellant knowingly waived his right to effective counsel

and/or that the within Appellant was fully aware of the ramifications of his actions in selecting Vernell to be and act as his trial counsel.

4 — That in view of the determinations as rendered by this Honorable Court, it is submitted that an evidentiary hearing is required under the circumstances of the case at bar, in order to fully dispel the propriety of the basis for this Honorable Court's determinations as aforementioned. It is accordingly submitted that such evidentiary hearing would manifest the following:

(a) That the within Appellant was not aware of the ramifications in continuing with Vernell as trial counsel, nor was he ever apprised of the same.

(b) That Appellant's election to continue with Vernell as trial counsel was predicated solely upon the existence of, and adherence to, the Court-approved stipulation of the parties, and that, in the absence thereof, the within Appellant would have retained other counsel.

(c) That the actions of both Appellant and Appellant's attorney fully comported with the Court-approved stipulation of the parties and that the calling of Ralph Harrington as a witness for Appellant was not a departure therefrom.

5 — That in support of the within Motion, the Appellant has attached hereto the Affidavits of all trial counsel participating in the trial of the within Appellant as representatives of all the co-defendants charged, i.e., Donald Bierman, Harvey StJean, and George Gold. That in addition thereto, the within Appellant has attached his own Affidavit and that of undersigned counsel.

6 — That it is verily submitted that such Affidavits

reflect a prima facie showing that the basis upon which the Court determined material issues of fact was inappropriate and/or erroneous.

7 — That it is verily believed to be in the interests of justice that an evidentiary hearing be had as to all matters concerning the alleged violation of the Court-approved stipulation of the parties and the election of the Appellant to continue with Vernell as trial counsel; that the importance of such hearing is underscored through the finding by this Honorable Court that the within Appellant, was, in truth and in fact, prejudiced as a result of the violation of such stipulation, and in its further determination that the within Appellant was left without the effective assistance of counsel.

WHEREFORE, and by reason of the foregoing, the Appellant respectfully moves this Honorable Court to remand this cause to the United States District Court for the Southern District of Florida, for an evidentiary hearing for the purpose of ascertaining all the circumstances surrounding the Court-approved stipulation and the retention by the Appellant of the services of Vernell as trial attorney.

/s/ Louis Vernell

LOUIS VERNELL
Attorney for Appellant
407 Lincoln Road — Suite 10-L
Miami Beach, Florida 33139

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was mailed to the Office of the U.S. Attorney, Ainsley Building, Miami, Florida, this 30 day of June, 1972.

/s/ Louis Vernell

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 71-2495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN CLARENCE COOK,
Defendant-Appellant.

AFFIDAVIT

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

HARVEY StJEAN, being duly sworn, deposes and states as follows:

1 — That he is a duly licensed and practicing attorney in the County of Dade and State of Florida, and that he is duly admitted and licensed to practice in the United States District Court for the Southern District of Florida and in the United States Court of Appeals for the Fifth Circuit.

2 — That in the course of his practice he did represent one ROY RENDERER, a co-defendant in the trial of JOHN CLARENCE COOK, lately pending in the United States District Court for the Southern District of Florida,

Miami Division; said trial commencing on April 5, 1971, and terminating on April 15, 1971.

3 — That at and/or prior to the commencement of trial proceedings, your Affiant was advised that counsel for the co-defendant, JOHN CLARENCE COOK, i.e., LOUIS VERNELL, was alleged to have been a participant in one of the overt acts charged in the subject indictment.

4 — That accordingly, and at the commencement of trial proceedings, such matter was duly brought to the attention of the trial judge, and thereupon the parties entered into the stipulation as reflected in the Appendix, pages 60 through 63; such stipulation being duly approved by the trial judge.

5 — That it was the understanding of your Affiant with respect to such stipulation that none of the parties would either mention the name of Louis Vernell or otherwise identify him as a participant in the subject overt act, and that, in consideration therefor, the said Louis Vernell would not appear as a witness in the cause and would accordingly continue to act as trial counsel for the co-defendant JOHN CLARENCE COOK.

6 — That except for the stipulation embodied on pages 60 through 63 of the Appendix, and your Affiant's understanding with respect thereto, Affiant is not aware of any other agreement or understanding relative to any of the evidence which could have been and/or was adduced during trial proceedings; that specifically, it was never the understanding of your Affiant that the stipulation of the parties would and/or could restrict testimony of events following the departure of Holmes and Allison from the

Cook residence (being the overt act in which Vernell allegedly participated), nor was it your Affiant's understanding that such stipulation would preclude the calling of a witness by any party to testify as to matters related thereto.

7 — That Affiant suggests that throughout the course of trial proceedings both your Affiant and the said Louis Vernell, as counsel for the co-defendant Cook did adhere to the stipulation of the parties and your Affiant's understanding with respect thereto, and accordingly, except when directed by the trial judge, the name and identity of Vernell was not otherwise elicited during the trial.

8 — That accordingly, and based upon your Affiant's understanding of the subject stipulation, the appearance of Ralph Harrington as a witness for the co-defendant Cook, and the testimony presented by such witness, did not constitute a violation of and/or departure from the stipulation entered into by the parties.

9 — That your Affiant verily believes that in eliciting testimony identifying Louis Vernell as a partcipant in the subject overt act, such evidentiary matter substantially prejudiced both the co-defendant Cook and the defendant Roy Renderer, and that, in the face of such manifest prejudice, your Affiant did, in behalf of his client, Roy Renderer, repeatedly move for a severance of trials and/or a mistrial, all of which motions were duly denied by the trial court.

10 — That your Affiant suggests that, with the admissions into evidence of testimony identifying Louis Vernell as a participant in the subject overt act, his effective-

ness as attorney for the co-defendant Cook was totally destroyed, and accordingly the said Louis Vernell should not and/or could not properly have continued as trial counsel.

11 — Affiant further states that at no time during the course of trial proceedings did the trial judge make any inquiry of the co-defendant JOHN CLARENCE COOK as to his understanding of the situation and any possible prejudice which might otherwise be inuring to such co-defendant.

FURTHER AFFIANT SAYETH NOT.

/s/ Harvey StJean

HARVEY StJEAN

SWORN TO AND SUBSCRIBED before me this 30 day of June, 1972.

/s/ Margot Lifton

Notary Public, State of Florida at Large My Commission Expires Nov. 11, 1974 Bonded through Fred W. Diestelhorst

(Notary's Seal)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 71-2495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN CLARENCE COOK,
Defendant-Appellant.

AFFIDAVIT

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

DONALD BIERMAN, being duly sworn, deposes and states as follows:

1 — That he is a duly licensed and practicing attorney in the County of Dade and State of Florida, and that he is duly admitted and licensed to practice in the United States District Court for the Southern District of Florida and in the United States Court of Appeals for the Fifth Circuit.

2 — That in the course of his practice he did represent one RICHARD CARTER CHAPMAN, a co-defendant in the trial of JOHN CLARENCE COOK, lately

pending in the United States District Court for the Southern District of Florida, Miami Division; said trial commencing on April 5, 1971, and terminating on April 15, 1971.

3 — That at and/or prior to the commencement of trial proceedings, your Affiant was advised that counsel for the co-defendant, JOHN CLARENCE COOK, i.e., LOUIS VERNELL, was alleged to have been a participant in one of the overt acts charged in the subject indictment.

4 — That accordingly, and at the commencement of trial proceedings, such matter was duly brought to the attention of the trial judge, and thereupon the parties entered into the stipulation as reflected in the Appendix, pages 60 through 63; such stipulation being duly approved by the trial judge.

5 — That it was the understanding of your Affiant with respect to such stipulation that none of the parties would either mention the name of Louis Vernell or otherwise identify him as a participant in the subject overt act, and that, in consideration therefor, the said Louis Vernell would not appear as a witness in the cause and would accordingly continue to act as trial counsel for the co-defendant JOHN CLARENCE COOK.

6 — That except for the stipulation embodied on pages 60 through 63 of the Appendix, and your Affiant's understanding with respect thereto, Affiant is not aware of any other agreement or understanding relative to any of the evidence which could have been and/or was adduced during trial proceedings; that specifically, it was never the

understanding of your Affiant that the stipulation of the parties would and/or could restrict testimony of events following the departure of Holmes and Allison from the Cook residence (being the overt act in which Vernell allegedly participated), nor was it your Affiant's understanding that such stipulation would preclude the calling of a witness by any party to testify as to matters related thereto.

7 — That Affiant suggests that throughout the course of trial proceedings both your Affiant and the said Louis Vernell, as counsel for the co-defendant Cook, did adhere to the stipulation of the parties and your Affiant's understanding with respect thereto, and accordingly, except when directed by the trial judge, the name and identity of Vernell was not otherwise elicited during the trial.

8 — That accordingly, and based upon your Affiant's understanding of the subject stipulation, the appearance of Ralph Harrington as a witness for the co-defendant Cook, and the testimony presented by such witness, did not constitute a violation of and/or departure from the stipulation entered into by the parties.

9 — That your Affiant verily believes that in eliciting testimony identifying Louis Vernell as a participant in the subject overt act, such evidentiary matter substantially prejudiced both the co-defendant Cook and the defendant Richard Carter Chapman, and that, in the face of such manifest prejudice, your Affiant did, in behalf of his client, Richard Carter Chapman, repeatedly move for a severance of trials and/or a mistrial, all of which motions were duly denied by the trial court.

10 — That your Affiant suggests that, with the admissions into evidence of testimony identifying Louis Vernell as a participant in the subject overt act, his effectiveness as attorney for the co-defendant Cook was totally destroyed, and accordingly the said Louis Vernell should not and/or could not properly have continued as trial counsel.

11 — Affiant further states that at no time during the course of trial proceedings did the trial judge make any inquiry of the co-defendant JOHN CLARENCE COOK as to his understanding of the situation and any possible prejudice which might otherwise be inuring to such co-defendant.

FURTHER AFFIANT SAYETH NOT.

/s/ DONALD BIERMAN

SWORN TO AND SUBSCRIBED before me, this 30 day of June, 1972.

MARGOT LIFTON
Notary Public, State of Florida at Large. My commission expires Nov. 11, 1974. Bonded through Fred W. Diestelhorst.

(Notary's Seal)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 71-2495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN CLARENCE COOK,
Defendant-Appellant.

AFFIDAVIT

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

GEORGE GOLD, being duly sworn, deposes and states as follows:

1 — That he is a duly licensed and practicing attorney in the County of Dade and State of Florida, and that he is duly admitted and licensed to practice in the United States District Court for the Southern District of Florida and in the United States Court of Appeals for the Fifth Circuit.

2 — That in the course of his practice he did represent one MARIANNE COOK, a co-defendant charged with JOHN CLARENCE COOK in the indictment re-

turned in the United States District Court for the Southern District of Florida, Miami Division.

3 — That although the trial of the said Marianne Cook was severed from the trial of the co-defendant JOHN CLARENCE COOK, your Affiant was nonetheless present throughout most of the trial proceedings which commenced on April 5, 1971, and terminated on April 15, 1971.

4 — That prior to the commencement of such trial proceedings, your Affiant was advised that counsel for the co-defendant, JOHN CLARENCE COOK, i.e., LOUIS VERNELL, was alleged to have been a participant in one of the overt acts charged in the subject indictment.

5 — That your Affiant was present at the commencement of trial proceedings on the occasion that such matter was brought to the attention of the trial judge, and your Affiant was likewise present when the parties entered into the stipulation as referred to on pages 60 through 63 of the Appendix filed in the within cause; such stipulation receiving the approval of the trial judge.

6 — That your Affiant has read the affidavit of Harvey StJean, counsel for the co-defendant Roy Renderer, and that, based upon his own observation of the trial proceedings, his understanding and opinion, the contents of such affidavit are herewith stated as being true and correct.

FURTHER AFFIANT SAYETH NOT.

/s/ GEORGE GOLD

George Gold

SWORN TO AND SUBSCRIBED before me this 30th day of June, 1972.

/s/ MARGOT LIPTON

Notary Public, State of Florida

Notary Public, State of Florida at Large. My commission expires Nov. 11, 1974. Bonded through Fred W. Diestelhorst.

(Notary's Seal)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 71-2495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN CLARENCE COOK,
Defendant-Appellant.

AFFIDAVIT

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

LOUIS VERNELL, being duly sworn, deposes and states as follows:

1 — That he is a duly licensed and practicing attorney in the County of Dade and State of Florida, and that he is duly admitted and licensed to practice in the United States District Court for the Southern District of Florida and in the United States Court of Appeals for the Fifth Circuit.

2 — That the Affiant did represent JOHN CLARENCE COOK in the trial of the within cause, which commenced on April 5, 1971, and terminated on April 15, 1971.

3 — That prior to commencement of trial, your Affiant was informed that he allegedly participated in one of the overt acts charged in the indictment against the Appellant herein; that as a result of such information, the Affiant contacted both the Appellant and the Office of the United States Attorney in order to arrive at a determination as to the propriety of your Affiant's representing the Appellant during trial proceedings.

4 — That an appropriate understanding was reached between Affiant and the Office of the United States Attorney wherein it was agreed that no mention would be made as to the name or participation of your Affiant in connection with the subject over act. That in arriving at such understanding, the parties acknowledged that such an agreement would obviate the necessity for continuance to allow additional time for new counsel's preparation and would further avoid the possibility of a mistrial during the trial of the cause.

5 — That Affiant communicated such conversation and understanding with the Appellant herein, and it was accordingly agreed that if no disclosure would be made to the jury of your Affiant's participation in the subject overt act, that your Affiant would continue to serve as trial counsel. Upon such understanding, the Appellant did elect to have your Affiant continue as trial counsel in the within cause.

6 — That thereafter, and after commencement of the trial proceedings, the matter was brought to the attention of the trial judge and all parties stipulated to the nondisclosure of your Afffiant's name and participation during trial of the cause. (Appendix, pages 60 to 63).

7 — That at no time was your Affiant aware of any other restrictions upon the testimony or evidence which could and/or may have been presented by any party to the cause; that accordingly, in calling Ralph Harrington as a witness for the Appellant, your Affiant verily believes that such action fully comported with the stipulation of the parties especially inasmuch as such witness was previously instructed not to mention your Affiant's name while testifying in the cause. As noted, the Government had previously instructed its own witnesses, i.e., Holmes and Allison, in like manner.

8 — That Affiant accordingly suggests that the only matters stipulated to reflected upon the non-mention of Affiant's name and participation in the subject overt act and the waiver by your Affiant of his right to be a witness in the cause.

9 — That Affiant suggests that, after the trial court directed the disclosure of your Affiant's name and participation in the subject overt act, his effectiveness as attorney for the within Appellant was totally destroyed; that Affiant thereupon was subjected to an irreconcilable conflict in which not only your Affiant's interests were at jeopardy, but also the interests of the Appellant as well. That indeed, so severe was the anxiety and stress which was exerted upon your Affiant, that it was at all times thereafter, following such disclosure, difficult to envision who was really being tried in the cause, i.e., your Affiant or the Appellant.

10 — That your Affiant states that in deference to the interests of the Appellant, he would not have represented the Appellant during the trial of the cause if there

was any possibility that such disclosures as were made, would have been made.

11 — That Affiant further suggests that such disclosures totally discredited both the Appellant as well as your Affiant, and that the same irreparably prejudiced the Appellant before the trial jury.

FURTHER AFFIANT SAYETH NOT.

/s/ LOUIS VERNELL

SWORN TO AND SUBSCRIBED before me this 30 day of June, 1972.

/s/ MARGOT LIPTON

Notary Public, State of Florida

Notary Public, State of Florida at Large. My commission expires Nov. 11, 1974. Bonded through Fred W. Diestelhorst.

(Notary's Seal)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 71-2495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN CLARENCE COOK,
Defendant-Appellant.

AFFIDAVIT

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

JOHN CLARENCE COOK, Defendant-Appellant in the above-entitled cause, being duly sworn and put upon oath, deposes and states as follows:

1 — That he is the Defendant-Appellant in the above-entitled cause, and the same person against whom adjudications of guilt were entered in the United States District Court for the Southern District of Florida, Miami Division, on June 10, 1971.

2 — That prior to the entry of such adjudications of guilt, and more particularly, during the trial proceedings incident thereto, the within Appellant was represented by

Louis Vernell, Attorney-at-Law, who likewise had represented Appellant and Appellant's family, rendering legal services and assistance thereto for a period of several years previous to the commencement of trial proceedings.

3 — That shortly prior to the commencement of trial proceedings in the District Court below, the within Appellant was apprised of the fact that one of the overt acts charged in the subject Indictment, and the Government's proof in support thereof, circumscribed certain actions and conduct participated in by his said attorney, Louis Vernell.

4 — That in consequence thereof, the within Appellant and the said Louis Vernell did confer and otherwise conclude that if evidence were to be received during trial proceedings identifying the said Louis Vernell as a participant in one of the overt acts charged against the Appellant, that the same would not only destroy and otherwise negate the effectiveness of the said Louis Vernell as trial counsel for the within Appellant, but would otherwise materially prejudice the Appellant before the jury.

5 — That it was accordingly agreed between the within Appellant and the said Louis Vernell that if, through Court order or stipulation of the parties, the testimony and/or evidence which might otherwise be received could be restricted so as to preclude the name and identification of the said Louis Vernell as a participant in the subject overt act, then the said Louis Vernell could, under such circumstances, continue as trial counsel for the within Appellant. In such event, and as trial attorney, the said Louis Vernell would waive any right to take the stand or otherwise appear as a witness in the cause.

6 — That it was the further understanding of the within Appellant that if the testimony and evidence could not be so restricted, then and in such event, it would be requisite that the said Louis Vernell withdraw as trial attorney for the within Appellant and, if warranted by the circumstances, testify as a witness in the cause.

7 — That thereafter and prior to the commencement of trial, the within Appellant was advised by the said Louis Vernell that the office of the United States Attorney had fully acknowledged and concurred in the understanding reached between Appellant and the said Louis Vernell.

8 — That accordingly, and upon the commencement of trial proceedings, all parties stipulated, with Court approval, to refrain from any mention of the name "Louis Vernell" during the course of trial proceedings and, in consideration therefor, the said Louis Vernell agreed not to take the stand as a witness in the cause; such understanding and agreement being reflected on pages 63 through 66 of the Appendix as filed before this Honorable Court.

9 — That except for the foregoing, the within Appellant had no other understanding or agreement with respect to any of the aforementioned matters, nor was the Appellant aware of any other restrictions upon the testimony or evidence which could and/or may have been introduced by any party to the cause.

10 — That in determining to have Vernell act and continue to serve as trial counsel, the Appellant fully relied upon the advice imparted to him that no mention would be made as to the name or identification of Vernell as a participant in one of the overt acts charged, which said advice was implemented into the Court-approved stipula-

tion as aforementioned. That in the absence of such stipulation or agreement, your Affiant would have retained other counsel to represent him during trial of the subject clause.

11 — That accordingly, the within Appellant was not aware of, nor could he adequately appreciate the prejudicial effect which a disclosure of Vernell's participation would have upon the trial jury, were the said Vernell to continue as trial attorney. Indeed, no inquiry was ever made by the Court or counsel as to Appellant's awareness of the consequences and/or ramifications of his decision to continue with the services of the said Vernell.

12 — That Affiant accordingly submits that the disclosure of the name and identification of Vernell as a participant in the subject overt act not only violated the stipulation of the parties, but was also contrary to the "sine qua non" of Vernell's representation of the Appellant.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ JOHN CLARENCE COOK

JOHN CLARENCE COOK

SWORN TO AND SUBSCRIBED before me this 30 day of June, 1972.

/s/ MARGOT LIFTON

Notary Public, State of Florida

Notary Public, State of Florida at Large. My commission expires Nov. 11, 1974. Bonded through Fred W. Diestelhorst.

(Notary's Seal)

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2495

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN CLARENCE COOK,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Filed July 18, 1972

Before PHILLIPS*, THORNBERRY and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that Appellant's motion for remand of the above cause for an evidentiary hearing is hereby Denied.

IT IS FURTHER ORDERED that Appellant's motion to stay the issuance of the mandate pending determination of the motion for remand is hereby Denied.

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*Of the Tenth Circuit, sitting by designation.

APPENDIX F

[5] MR. VERNELL: I believe all counsel are amenable to stipulating, if the Court please, that the Government propose Allison and Holmes, and whatever witnesses the Government may have to elicit testimony along these lines, be restricted, if the Court please, that they not testify to my presence in any matters of John Clarence Cook.

Your Honor, we feel the admissibility of such testimony would only be prejudicial, might very well be subject to mistrial.

Your Honor, in sincere efforts to avoid such possibilities, the defense, and I trust the co-defendants, and the Government are agreeable to stipulating to restrict such Government witnesses accordingly.

THE COURT: Who are the witnesses allegedly involved?

MR. SONNETT: May I put a short proffer on the record?

The two Government witnesses in issue are William Stafford Allison and Jimmy Jack Holmes. Both of them are named as co-defendants in the [6] indictment and will be Government witnesses during this trial. The testimony concerns a date alleged in the indictment when

Jimmy Jack Holmes and William Stafford Allison delivered postage stamps to the home of John Clarence Cook. The facts will indicate that they arrived in an automobile and a third man was left in the automobile; when the police arrived the third man was arrested and the car was prepared to be towed away, at which time one of the defendants went out to the car and surreptitiously or illegally removed from the car other stolen merchandise.

At that time, the other defendant already provided the defense counsel indicates Mr. Vernell was called by John Clarence Cook, he went to the house, that he was told by Mr. Cook that there were some things in the car that they didn't want the police to get, they didn't want the house searched. The testimony further indicates Mr. Vernell left accompanied by both of the witnesses in his car, William Stafford Allison and Jimmy Jack Holmes.

The car was stopped a block away with Mr. Vernell, William Stafford Allison and two other persons as passengers, and Mr. Vernell and one of the other passengers were searched by the police, and upon the beginning of the police to search Mr. Allison and [7] Mr. Holmes, that Mr. Vernell stated he was their attorney, that he would not allow any identification or for them to be searched, and he was representing the two of them.

In an effort to move along smoothly, to stay away from any possibility of error, the Government has talked with these witnesses, has told them we do not want any mention in direct. What I propose to do is stop the questioning of both these witnesses at the point where the police towed away the car, without any mention of Mr. Vernell having arrived on the scene. I will simply propose

they did, they left, without mentioning with Mr. Vernell or in his car.

I do that in an effort to save the Court time and trouble, and I would at this time like to question all defense counsel as to whether or not they are agreeable to that procedure, as to whether or not they feel any necessity for any facts and are going to stay away from them in their cross-examination. I would further like to ask in open court and have Mr. Vernell on the record state at this time whether or not he has any intention in the absence of that testimony of taking the stand as defense.

MR. VERNELL: Your Honor, I have no such intention. Should the representation not be [8] adhered to, I would like to correct, if I may, or remind Mr. Sonnett that neither the statement by the Government or the Grand Jury designates I was aware of the particular happenings, which was merchandise stolen. This was merely injected between Mr. Sonnett and Mr. Holmes this past week for the first time—as I indicated to the Court—the statements by the Government or the Grand Jury testimony, the substance of the conversations that was related to Mr. Sonnett, who thereon related, relative to my—

MR. SONNETT: Nor am I making any representation there is an attorney not acting ethically at all times to seek to avoid testimony of the sort, as to avoid limitations of cross-examination rights on behalf of Mr. Vernell or any other defendants. I want it in the record I am not making inordinate allegations that he was co-conspirator or had any knowledge other than the knowledge imparted to him as an attorney in this matter.

MR. VERNELL: Your Honor, I would, by stipulation, not take the stand if the Government stays away from this area.

THE COURT: What about Mr. Bierman?

MR. BIERMAN: On behalf of Defendant Chapman, we had nothing to do with this group of [9] stamps. Even so, assuming the Government to be correct, we are glad to stipulate that that is correct.

MR. SONNETT: Well, the evidence will not show Mr. Chapman at the house. On that basis, I would like to ask for a stipulation.

MR. BIERMAN: We would be glad to so stipulate.

MR. ST. JEAN: On behalf of Defendant Renderer, we will refrain from questioning the witnesses on that particular incident.

THE COURT: You then join in the stipulation?

MR. ST. JEAN: We do.

THE COURT: The stipulation is, if there is any occasion during the trial, a departure from it, since it is the stipulation of counsel, the purpose of which is quite evident to the Trial Judge, we will dispatch matters as we think necessary to prevent any unwieldly breach of it.

MR. SONNET: Thank you.

APPENDIX G

[1680] Unless counsel request that I make a review of the evidence in respect of the several counts, I do not propose to do so, because it has been fully and very recently argued by counsel, and I think is and should be fresh in the jury's mind. If counsel desire that I do so, I shall.

MR. ST. JEAN: The Defendant Renderer has no objection, Your Honor, of not reviewing it. I think it has been fully covered.

MR. VERNELL: Defendant Cook joins in that position, Your Honor.

MR. BIERMAN: Same position, Your Honor.

MR. SONNETT: Same position, Your Honor.

THE COURT: Let me add one thing. In respect of one of these counts relating to Mr. Cook, some developments occurred in what the jury might regard as an unusual sequence, and I am referring to this merely by way of explanation, so that you are not [1681] misguided or misled by what happened, and that is in respect to Mr. Vernell's summons to, and presence at, and departure from the Cook home.

In the first place, you will remember—and if your recollection differs from mine, please follow your own

recollection—you will remember that when Holmes and Allison testified, the examination by the United States Attorney took them up to the point that they were in the Cook home, what developed there, and then they were asked, "Did you thereafter leave?" and the answer was "Yes," and there was no examination as to how, with whom, under what circumstances, or the like, the departure occurred.

There was no cross-examination to elicit that. I was aware that there would be no examination by the Government or by defendants' counsel, because counsel had stipulated, and I had approved the stipulation to avoid probable embarrassment to Mr. Vernell and to avoid the possibility that, if the testimony were brought out, he might be obliged, then, to take the witness stand and testify as a witness, if he so elected, which would necessarily result in an abortion of this trial, because an attorney who is trying the case cannot be both a witness and a trial [1682] counsel.

If, during the trial, a trial lawyer engaged in the trial, takes the witness stand as a witness, he then offers himself as a witness for examination and cross-examination like any other witness, and his credibility is thereupon an issue just as that of every other witness, and under the Canons of Ethics he cannot thereafter continue to be the trial lawyer and the witness, and if that happens in the course of a trial and a party with you has to take the witness stand or determines that he must, and does so, and there is no other counsel prepared and able to carry on from there, it inevitably results in a mistrial, which means that the case has to be continued and the trial begun anew all over at another time before another jury.

Having in mind not only possible embarrassment to Mr. Vernell as a member of the Bar, and having in mind the possibility of a mistrial caused in such fashion, all of counsel agreed that the Government's witnesses would not be asked about the circumstances under which they departed from Mr. Cook's house, and all parties adhered to that stipulation to not ask the Government witnesses about it.

[1683] Therefore, on that score, the Government witnesses, Holmes and Allison, cannot be regarded as having withheld that information when they were first on the witness stand, because they were not asked about it and they were not asked about it because there was a stipulation among counsel that they should not be, and the Court approved of that for the reasons indicated.

Then, it developed later in the trial that Mr. Vernell called a witness who had been in the car when Mr. Vernell went after receiving a call apparently at his office to come to Mr. Cook's home, and that witness testified persistently about "the man with whom I came," or words to that effect.

It was not immediately evident to me, because I was unaware that there were other persons in the car with Mr. Vernell, that this witness had been in Mr. Vernell's car. Mr. Vernell examined this witness about conversations allegedly having taken place between a tall man and a shorter man who had emerged with the man with whom the witness came, after those men got in the car, and as to what one or another of those men might or might not have had in his possession at that time.

[1684] Thereupon, having asked the witness, "Who was the man who came with you?" I merely felt, members of the jury, that if this case—and all which we are seeking to see is a just and honest verdict—if we were to leave it in that fashion, that eleven intelligent jurors, as you are, are going to say to yourselves when you get to the jury room, "Who is hiding what from whom, and what is the Trial Judge doing in this situation? Why do they always say 'the man you came with'?"

Similarly, the Government's counsel, Mr. Sonnett, felt that since it had been elicited from this witness as to purported conversations that took place between men who were obviously—the tall and the short man—Holmes and Allison, that that went beyond the terms of the stipulation and put the Government in a position that something was being elicited by the defendant's examination of that witness that the Government had agreed to say nothing about.

In the circumstances, the examination of that witness called on behalf of Mr. Cook continued, and it developed that the man that came was Mr. Vernell and that Mr. Vernell had been summoned there by Mr. Cook.

[1685] You have heard the evidence. I have no desire to add or take from it. I have no desire to talk on that evidence as I do on any other. I merely make that explanation for you, or to you, rather, because it has been requested by Mr. Vernell so the circumstances are clear, and I am glad to make that explanation so that you have an understanding of what took place and why it developed in the course that it did.

Now, first, let me ask, are there any inadvertent

statements or omissions which Government's counsel has noted and wishes to call to my attention?

MR. SONNETT: No, Your Honor.

MR. BIERMAN: There is one area.

THE COURT: You are not Government's counsel.

MR. BIERMAN: I am sorry.

THE COURT: I now come to you.

Mr. Bierman, are there any which you want to call?

MR. BIERMAN: There is one, Your Honor. The Court, I am sure inadvertently, neglected to state that evidence includes stipulations.

THE COURT: Evidence, members of the [1686] jury, includes stipulations, and where facts are stipulated, you are to take them as established facts which require no evidence to prove.

Does that meet my omission? And thank you for calling it to my attention.

Mr. St. Jean?

MR. ST. JEAN: I have none, Your Honor.

MR. VERNELL: With all due respect to the Court, I appreciate the Court's expressions relating to the Canons of Ethics. I did not enter the stipulation, if the Court

please, because I felt anything embarrassing for what I did.

THE COURT: No, I did not say—we are not going to have it argued before this jury. I did not say that you said anything about embarrassment. It was to avoid any possible embarrassment of your name being mentioned in the course of the trial.

Now, in respect of Defendant Cook's points, let me say that counsel for each party has the right to make requests to the Court in writing, in advance of the charge, respecting any matter of law that he wants the judge to charge upon.

* * *

APPENDIX H

* * *

[1356] Q. Where did you go?

A. We went to a motel on Biscayne.

Q. And did Mr. Vernell stay there for any length of time with you?

A. No, sir. He registered us and we stayed and he left.

Q. Where did Mr. Vernell go?

A. I don't know.

Q. Would you tell the ladies and gentlemen of the jury, please, Mr. Holmes, why it is that you did not testify as to any of these facts when you were on the stand last week.

A. Well, you told me not to.

Q. What did I tell you about not testifying to those facts?

A. Because you didn't want Mr. Vernell's name mentioned to cause him undue embarrassment.

Q. When you got into the car that evening did you have the savings stamps with you?

A. No.

Q. What happened to the savings stamps?

A. We left them at Cook's house.

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-219

JOHN CLARENCE COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to burglarize post offices and of receiving, concealing and possessing stolen postage stamps on three occasions, in violation of 18 U.S.C. 371 and 641. He was sentenced to imprisonment for twelve years and to fines aggregating $30,000. The court of appeals affirmed (Pet. App. 13-23).

Petitioner's arguments in support of his petition for certiorari were raised before the court of appeals and that court fully considered and properly rejected

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them.[1] In opposing further review, we rely mainly on the pertinent portion of the opinion below (Pet. App. 20–23).

In response to petitioner's contention that the record is inadequate to support the conclusion that he had "waived" his right to be represented by counsel unencumbered by a perhaps conflicting personal interest, we point out that petitioner was undeniably aware of his lawyer's awkward involvement in some of the events in issue, and he nevertheless retained the lawyer to represent him at trial. Even if that choice proved embarrassing to both petitioner and his counsel, it was a risk that must necessarily have been contemplated. And disclosure of this fact came about only after the trial judge found that in defending petitioner's interests at the trial his counsel had used the strictures of the stipulation to create a misleading impression about the evidence in the minds of the jurors.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

[1] Petitioner has apparently abandoned other arguments which he made in the court of appeals.

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